APPENDIX

DEC 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 454

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

THE STATE BAR OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MICHIGAN

PETITION FOR CERTIORARI FILED JULY 22, 1970
CERTIORARI GRANTED OCTOBER 12, 1970

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APPENDIX

IN THE

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OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION,

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vs.

THE STATE BAR OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

[18]*

CIRCUIT COURT CALENDAR ENTRIES

1959

Jan. 28. Bill of complaint filed.

June 9. Answer to bill of complaint filed.

June 16. Plaintiff's reply to defendant's answer, filed.

Nov. 17. Interrogatories filed.

Nov. 25. Proof of service filed.

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*Numbers in brackets at the outer edges refer to the pages of the certified record.

1960

Jan. 26. Answers of William Kennedy, president, Brotherhood of Railroad Trainmen, to plaintiff's interrogatories.

May 9. Order and notice of pre-trial conference filed.

May 27. Stipulation filed.

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1961

Apr. 11. Plaintiffs statement of claim filed.

Apr. 11. Pre-trial summary by the court filed.

Apr. 12. Concise statement of defense filed.

Apr. 12. Order filed.

Apr. 14. Clerk's notice filed.

June 27. Exhibits filed (listed on summary sheet).

1962

Apr. 30. Motion to strike proceedings made in plaintiff's reply brief filed.

Apr. 30. Answer to motion to strike filed.

Sept. 12. Brief for plaintiff filed.

Sept. 12. Brief for defendants filed.

Sept. 12. Reply brief for plaintiff.

Sept. 12. Decision filed.

Sept. 14. Decree filed and entered.

Sept. 14. Clerk's notice filed.

Oct. 2. Appealed to Supreme Court, docket 2, page 138.

Oct. 5. Decree enrolled.

SUPREME COURT CALENDAR ENTRIES

1962

Oct. 2. Claim of appeal by defendants and proof of service filed.

Oct. 4. Notice of filing appeal and payment of appeal fee filed.

Dec. 28. Stipulation and Order extending time filed.

1963

Oct. 3. Certified to Supreme Court.

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1965

Jan. 22. Remittitur from Supreme Court reversing Judgment and remanding to the Court below, filed.

CIRCUIT COURT CALENDAR ENTRIES

1965

Jan. 20. Motion for further proceedings in Circuit Court on remand from Supreme Court, notice of hearing and proof of service filed and entered, and order.

June 9. Motion to Dismiss certain defendants and affidavit filed.

1968

April 22. Motion for judgment and notice of hearing filed.

May 24. Motion for dismiss a certain defendant and affidavit filed.

May 24. Notice of calling up motion for decision with exhibits filed.

May 24. Notice of calling up motion for decision filed.
May 24. Opinion and order filed.
May 27. Judgment (Amending decree) filed and entered.
May 27. Clerk's notice filed.
June 17. Claim of appeal filed, A1-75.

COURT OF APPEALS DOCKET ENTRIES

1968

June 17. Claim of appeal, notice, proof of service filed.
June 17. Certificate of court reporter filed.
Sept. 16. Remittitur from Supreme Court granting application by defendants for leave to appeal prior to decision by the Court of Appeals is considered filed.
Oct. 4. Notice of filing transcript of record filed.
Oct. 4. Transcript of testimony filed.
Oct. 4. Affidavit filed.

[1]

SUPREME COURT CALENDAR ENTRIES

1968

July 11. Application filed (by pass).
Sept. 12. Application granted.

1969

Oct. 29. Circuit Court records filed.
Oct. 29. Notice for December filed.
Dec. 9. Argued and submitted.

1970

Mar. 9. Affirmed. No cost.
Mar. 27. Application for rehearing filed.
May 4. Ordered rehearing denied.
June 10. Record certified to Supreme Court of U.S.

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IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON

THE STATE BAR OF MICHIGAN,
vs.
THE BROTHERHOOD OF RAILROAD TRAINMEN,
No. T—640

BILL OF COMPLAINT

(Filed January 28, 1959)

The State Bar of Michigan respectfully represents unto this Honorable Court:

1. That it is a public body corporate, charged with the duty to aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in the State of Michigan.

2. That the Brotherhood of Railroad Trainmen is a national railway labor organization, with principal office in Cleveland, Ohio, but having branches, members, officers and agents throughout the United States, including the State of Michigan.

3. That Frank J. Carr and L. M. Hasbrouck, of Jackson, Raymond Fieberkorn and Thomas W. Fletcher, of Detroit, W. C. Coryell, of Okemos, L. E. Singer of Plymouth, E. V. Surdam of Grand Rapids, H. F. McCall of Birmingham, R. J. Johnson, and L. A. Russell, of Durand, A. V. Grandstaff, of Dearborn, W. T. Ellsworth,

of Allen Park, R. J. Snow, of Melvindale, and William E. B. Chase, of Livonia, are members, officers and agents of defendant Brotherhood of Railroad Trainmen residing within the State of Michigan, and that there are other members, officers and agents of said defendant Brotherhood of Railroad Trainmen, within the State of Michigan, constituting a class so numerous as to make it impracticable to bring them all before the court, as

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to all of whom there are common questions of law and fact affecting their several rights and against all of whom a common relief is sought, as hereinafter shown.

4. That, in or about the year 1930, the Brotherhood of Railroad Trainmen organized and established a so-called "Legal Aid Department" as a division of said Brotherhood of Railroad Trainmen, representing, as reasons for organizing said Legal Aid Department, the following:

> Many lawyers frequently abuse the confidence of their clients by effecting low settlements in the case in order to obtain a higher settlement in some other case against the same railroad; incompetently preparing and processing such cases upon the law or the facts; not fully and fairly explaining to the client the terms of the employment, so that the client, after having assented to settlement, finds the proceeds thereof surcharged with items for expenses of litigation, medical expenses, expenses of one sort and another or the like, which are not legitimate, or if legitimate, were not explained to him before the settlement was concluded, as well as in other ways.
>
> Adequate compensation cannot in general be exacted if members of the Brotherhood are persuaded

by claim agents either to settle their own claims or to place them in the hands of incompetent, inexperienced or otherwise inadequate counsel.

In 1930, A. F. Whitney, then President of the Brotherhood, in a public utterance to the Brotherhood's membership, declared that in his several

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years experience as an officer of the Brotherhood it had come to his attention that members who had been killed while engaged in railroad service had fared rather badly at the hands of railroad claim agents in some instances, as well as at the hands of so-called ambulance-chasing lawyers, and that settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers had been made with members of the Brotherhood who were either entirely devoid of their rights in such matters or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements.

5. Plaintiff is informed and believes, and therefore alleges as true, that the Constitution and By-laws of the defendant Brotherhood of Railroad Trainmen require, and the so-called Legal Aid Department of said Brotherhood of Railroad Trainmen has, ever since its formation, by and through its members, officers and agents, pursued and continues to pursue and engage in a well-organized and systematized solicitation, for so-called Regional Counsel, of claims and/or causes of action for personal injuries and/or death of railroad employees arising under the Federal Employers Liability Act, using the methods and practices, as follows:

A member representative of the Brotherhood, usually the Chairman of the Grievance Committee in the locale of the accident, calls upon the injured employee or his bereaved family, and not only explains to them that they can, but recommends and urges

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that they do consult with the Regional Counsel, and such representative urges said employees or survivors of the deceased employees not only to consult, but to retain Regional Counsel. Such employees or survivors of deceased employees are told that Regional Counsel will not charge in excess of 25 per cent (25%) of the amount of any recovery, whether recovery be affected by suit or settlement, and that this percentage will include expenses incidental to the investigation and any litigation of the claim.

6. Plaintiff is furtner informed and believes, and therefore alleges as true, that representatives of the Brotherhood of Railroad Trainmen are reimbursed for their time in bringing injured employees or the survivors of the deceased employees to the offices of the Regional Counsel. Reimbursement is at the member representative's hourly rate of pay on the railroad. Member representatives are also reimbursed for any out-of-pocket expenses incurred in bringing injured employees or the survivors of deceased employees to Regional Counsel.

7. Regional Counsel referred to above are the attorneys selected by the defendant Brotherhood of Railroad Trainmen, in some fifteen "regions" designated by said defendant to receive, through the methods and practices aforesaid, all Federal Employers Liability Act cases arising in their designated regions.

8. The Lower Peninsula of the State of Michigan, is the "region" of one Edward B. Henslee, an attorney, of Chicago, Illinois, and his associates, for whom de-

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fendants, or some of them, actively solicit, by the methods herein outlined, all cases of personal injury or death of railroad employees occurring in the State of Michigan, as plaintiff is informed and believes and thereupon alleges as true.

9. Plaintiff further shows unto the Court, on information and belief, that, by and through the operations of the Legal Aid Department of the Brotherhood of Railroad Trainmen in the State of Michigan, large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen residing in Michigan and whose claims have arisen within the State of Michigan, have been unlawfuly and improperly solicited by said Brotherhood of Railroad Trainmen Legal Aid Department, through its members, agents and officers, and have been directed into and handled by the office of Regional Counsel Henslee and associates in Chicago, Illinois and elsewhere, to the extent that a majority of such cases are so solicited and so handled.

10. That such solicitation, on an organized and systematized basis, interferes with and impedes the orderly administration of justice, adversely affects the relationship between the legal profession in the State of Michigan and the public, and causes, and threatens to cause, irreparable damages to property rights of the public and the legal profession in the State of Michigan.

11. Plaintiff further alleges that the methods of operation of the Legal Aid Department of the Brother-

hood of Railroad Trainmen, as set forth above, violate the Penal Code of the State of Michigan, particularly Section 410 thereof, being Section 28.642 of Michigan Statutes Annotated, which provides in part as follows:

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> "Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership association or organization of any kind, either incorporated or unincorporated, or of any division, bureau or committee of such association or organization, either incorporated or uncorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor * * *".

12. The matter in dispute in this case exceeds the sum of One Hundred and No/100 ($100.00) Dollars.

Wherefore, the premises being considered and plaintiff being without adequate remedy at law, the plaintiff prays:

(a) That the named defendants be required to answer this bill of complaint, paragraph by paragraph, on their oaths.

(b) That, on the hearing of this cause, all named defendants, and all other defendants of this class, members,

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agents and officers of the Brotherhood of Railroad Trainmen, be permanently enjoined from, directly or indirectly, engaging in the solicitation, in the State of Michigan, of claims and/or causes of action under the Federal Employers Liability Act, for the purpose of causing persons having such claims and/or representatives, to retain said Edward B. Henslee, and associates, or any other of the Regional Counsel of defendant Brotherhood of Railroad Trainmen, or any other attorney or attorneys, or firm of attorneys, in the prosecution and/or negotiation for settlement of such claims and/or causes of action.

(c) And that plaintiff may have such other and such further relief as equity and good conscience shall require, and as to this Honorable Court seems just.

/s/ State Bar of Michigan,
By Philip C. Kelly,

/s/ J. Cameron Hall,
General Counsel, State Bar of Michigan,

/s/ Philip C. Kelly,
301-4 Reynolds Building,
Jackson, Michigan,

/s/ J. Cameron Hall,
1323 Dime Building,
Detroit, Michigan,
Attorneys for Plaintiff.

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(Jurats omitted in printing)

R. 29

ANSWER TO BILL OF COMPLAINT

(Filed June 9, 1959)

Now comes the defendants by Edward B. Henslee, Jr., Martin K. Henslee, John J. Naughton and Arthur Lumley, their attorneys, and for answer to the bill of complaint say:

1. Defendants admit the allegations of paragraph one and two of the bill of complaint.

2. Defendants admit that they are members, officers and agents of defendant Brotherhood of Railroad Trainmen (hereinafter called Trainmen) residing within the State of Michigan and further admit that there are others in like capacity within the State. Defendants deny all other allegations in paragraph 3.

3. Defendants admit that in the year 1930 the Trainmen organized and established a department of the Trainmen designated as the "Legal Aid Department." Defendants admit that the representations alleged were stated, along with other representations, as factors to be considered in deciding whether a legal aid department should be established. Defendants deny all other allegations of paragraph four of the bill of complaint.

Defendants aver that on a referendum questionnaire and ballot in 1930, the members of the lodges of the Trainmen in the United States voted by a majority vote of eleven to one that a legal aid department should be organized.

Defendants further aver that the said Legal Aid Department was thereupon organized as a part of or de-

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partment of the defendant Trainmen and, as constituted, was directly subject to the provisions of the Constitution of the Trainmen and to the authority of the president of the Trainmen.

Defendants further aver that the title of the said Legal Aid Department was changed by order of the president of the Trainmen on or about January 1, 1959 and was redesignated as the "Department of Legal Counsel". Defendants aver that the title of the attorneys designated for the several regions was at the same time changed from "Regional Counsel" to their present designation as "Legal Counsel."

4. Defendants deny each and every allegation contained in paragraph five of the bill of complaint.

Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver that some of the said members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five percent (25%) of the amount of any recovery whether the recovery be affected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim.

Defendants further aver that this representation of the fee charged has been eliminated by order of the president of the Trainmen contained in his letter to all lodges dat-

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ed March 16, 1959, effective April 1, 1959, hereinafter set out in the First Affirmative Defense to this answer.

5. Defendants admit the allegations of paragraph six of the bill of complaint as being in existence up to and including the 31st day of March, A. D. 1959.

Defendants further aver that the said compensation and reimbursement has been terminated under the previously mentioned order of the president of the Trainmen dated March 16, 1959.

6. Defendants deny each and every allegation of paragraph seven of the bill of complaint.

Legal Counsel referred to above are attorneys designated by the defendant Trainmen in some seventeen regions designated by the said defendant as attorneys recommended for their qualifications and their integrity to be competent to prosecute claims arising under the Federal Employer's Liability Act for members of the Trainmen in their designated regions.

7. Defendants deny all of the allegations of paragraph eight of the bill of complaint except that they admit the Edward B. Henslee referred to at one time was the Regional Counsel for a region including the Lower Peninsula of the State of Michigan and that he had associates. Defendants further aver that the said Edward B. Henslee died on November 22, 1958.

8. Defendants deny each and every allegation of paragraphs, nine, ten and eleven of the bill of complaint.

9. Answering paragraph twelve of the bill of complaint, defendants deny each and every allegation contained therein and specifically and particularly deny that

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the plaintiff is entitled to any of the relief for which it prays.

First Affirmative Defense

For their First Affirmative Defense, defendants aver that defendant trainmen petitioned the Supreme Court of the State of Illinois for a declaratory judgment requesting that the Court rule that the conduct of trainmen and the operation of its Legal Aid Department, and the conduct of the attorneys who serve as its Regional Counsel was neither illegal nor unprofessional.

Hearings were held before the Honorable Charles H. Thompson, a former judge of the Supreme Court of Illinois as a special commissioner. Trainmen, the Illinois State and Chicago Bar Association, and a group of twenty-seven railroads appeared in the hearings by their counsel. Plaintiff herein, the State Bar of Michigan, filed charges with the Illinois State Bar Association and attempted to intervene in the declaratory judgment hearings. Evidence prepared by the plaintiff herein was presented at those hearings.

At the conclusion of the hearings, all parties filed briefs, and a brief was filed on behalf of the American Bar Association.

The opinion of the Supreme Court of Illinois as modified on denial of trainmen's petition for rehearing is reported at 13 Ill. 2d 391, 150 NE 2d 163. That Court decided that certain practices of the trainmen in its operation of the Legal Aid Department were objectionable and should be discontinued and the Court further indi-

cated what trainmen could do with respect to the injury and death claims of its members.

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In compliance with the opinion of the Supreme Court of Illinois, the president of Trainmen in a letter to all lodges and members ordered the following:

"Cleveland, Ohio, March 16, 1959

To All Lodges and Members:

The following for your information and instruction:

LEGAL COUNSEL

The following letter addressed by me to All Legal Counsel of the Brotherhood is self-explanatory:

March 16, 1959.

To All Legal Counsel,
Brotherhood of Railroad Trainmen.
Dear Sirs and Brothers:

Some time ago, I sent you a copy of the opinion of the Supreme Court of Illinois in a case in which the Brotherhood of Railroad Trainmen asked the Court of Illinois for a ruling as to what the Legal Aid Department of the Brotherhood can do for its injured members and the conduct that should be followed by Legal Counsel of the Brotherhood.

Under date of March 20, 1958, the Supreme Court of Illinois handed down its opinion which is found in volume 13, 2nd Edition of the Illinois Supreme Court reports on page 391.

In compliance with said opinion, any Legal Counsel who represents the Brotherhood is hereby instructed, and required, to live up to said opinion

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in its entirety, and any violation shall be cause to remove said attorney, and the same shall be reported to the Bar Association of the particular state in which such violation may occur.

The Brotherhood will finance its Legal Aid Department, and will investigate accidents so that it will be acquainted with the cause of said accidents, and by so doing will be able to remedy any violation of the Federal Employers' Liability Act and The Safety Appliance Act. The result of such investigation shall be made available only to the injured person.

Please arrange to comply with these instructions on and after April 1, 1959, and acknowledge receipt of this letter by return mail.

Fraternally yours,
/signed/ W.P. Kennedy, President."

Wherefore these defendants pray that the bill of complaint be dismissed for the reason that the issues raised by the bill of complaint are moot and the said bill is deficient for want of equity.

SECOND AFFIRMATIVE DEFENSE

For their Second Affirmative Defense, defendants aver that plaintiff herein in attempting to base its bill of complaint on an alleged violation of the statutes of the State of Michigan is attempting to enjoin the alleged commission of a crime and is patently attempting to deprive these defendants of their constitutional right to a trial by jury.

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Wherefore, these defendants pray that paragraph eleven of the bill of complaint be stricken and that any prayer for relief based thereon be dismissed for the reason that the said bill in that regard is deficient for want of equity.

THIRD AFFIRMATIVE DEFENSE

For their Third Affirmative Defense, defendants aver that their activities, past or present, do not infringe any statute, rule or law of the State of Michigan, do not interfere or impede the orderly administration of justice in the State of Michigan, and do not infringe the legal or property rights of any individual or group. Defendants further aver that if any of their actions could be considered an offense against any of the said laws or interest, the right of the Trainmen, and the consequent right of the remaining defendants as members, officers and agents of defendant Trainmen to advise injured trainmen or their bereaved families in claims arising under the Federal Employers' Liability Act derives directly from the Railway Labor Act (U.S.C.A., Title 45, Sections 151-164) and, to the extent that any statute or rule of Michigan Law might be deemed to interdict or prohibit the conduct and actions of the defendants, such statute or rule of Michigan law is, or would be, in conflict with the Railway Labor Act, the Interstate Commerce Clause of the Constitution of the United States (Article 1, Section 8) and the Supremacy Clause of the Constitution (Article VI, Clause 2).

Wherefore, these defendants, having answered the bill of complaint, pray that in this respect and, in the foregoing respects, the bill of complaint should be dismissed

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for want of equity and that these defendants should be awarded their costs.

Brotherhood of Railroad Trainmen,
By W. E. B. Chase, Vice President
Frank J. Carr
L. M. Hasbrouck
Raymond Fieberkorn
Thomas W. Fletcher
W. C. Coryell
L. E. Singer
E. V. Surdam
H. F. McCall
R. J. Johnson
L. A. Russel
William E. B. Chase, Individually
A. V. Grandstaff
W. T. Ellsworth
R. J. Snow
Defendants

Edward B. Henslee, Jr.,
Martin K. Henslee, and
John J. Naughton
139 N. Clark Street,
Chicago 2, Illinois
and
Arthur Lumley
1512 Dime Building,
Detroit, Michigan,
Attorneys for Defendants.

[37-39] (Jurats omitted in printing)

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PLAINTIFF'S REPLY TO DEFENDANTS' ANSWER

(Filed June 16, 1959)

Now comes the State Bar of Michigan, plaintiff herein, by way of reply to the answer of the defendants herein and shows unto the Court as follows:

1. Replying to the affirmative allegations contained in the second, third and fourth paragraphs of paragraph 3 of the answer herein, this plaintiff is without information sufficient to form a belief with respect thereto and hence, neither admits nor denies the same but leaves the defendants to their proofs thereof.

2. Replying to paragraph 4 thereof, the plaintiff shows that the defendants and each of them are precluded from denying the contents of the sub-paragraph under paragraph 5 of the bill of complaint, by reason of the admissions on behalf of the defendant Brotherhood and the findings of fact in a proceeding in the Supreme Court of the State of Illinois, to which proceeding and opinion reference is made at the top of page 6 in the defendant's answer, with reference to the matter of an investigation as to the practices of the Brotherhood of Railroad Trainmen, etc., 13 Illinois 2nd, 391. 150 Northeastern 2nd, 163.

Replying to the second paragraph under paragraph 4 of the defendants' answer, the plaintiff shows that the admissions by the defendants therein set forth constitute solicitation of claims within the Sate of Michigan by the defendants or by part or all of the defendants and by the defendant Brotherhood, on behalf of the Regional Counsel or Legal Counsel of the defendant Brotherhood.

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Replying to the third paragraph under paragraph 4 of the defendants' answer, the plaintiff shows that:

(a) The alleged order by the President of the defendant Brotherhood dated March 16, 1959 is alleged by the defendants in this paragraph to apply to the representation as to the fee to be charged by the Brotherhood's Regional Counsel or Legal Counsel and does not cover the many other courses of conduct which are the subject of this cause.

(b) There is no assurance that each and all of the members of the defendant Brotherhood will comply with the terms of such orders as may be issued by the President of the defendant Brotherhood.

(c) There is no assurance that if there were an order by the President of the defendant Brotherhood as alleged, the same might not be reversed by either this or a future officer of the defendant Brotherhood.

3. Replying to the affirmative matters set forth in paragraph 5 of the answer, wherein the defendants admit the allegations of paragraph 6 of the Bill of Complaint up to March 31, 1959, the plaintiff shows that even if the President of the defendant Brotherhood disseminated a communication dated March 16, 1959, the same does not constitute a defense in this cause for the reasons that:

(a) Said purported communication by the President of the defendant Brotherhood does not cover all of the matters concerned in this cause, nor is it alleged to cover all the matters of conduct concerned in this cause.

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(b) There is no assurance that each and all of the members of the defendant Brotherhood will comply with the terms of such orders as may be issued by the President of the defendant Brotherhood.

(c) There is no assurance that if there were an order by the President of the defendant Brotherhood as alleged, the same might not be reversed by either this or a future officer of the defendant Brotherhood.

4. Replying to the purported denials and affirmative allegations in paragraph 6 of the defendants' answer, the plaintiff shows that the second paragraph under paragraph 6 in effect admits the type of conduct alleged in paragraph 7 of the plaintiff's bill of complaint. The plaintiff further shows that the defendants are precluded from denying the conduct described in paragraph 7 of the plaintiffs' bill of complaint by reason of the admissions of the defendant Brotherhood and opinion of the Court in said Illinois case to which reference is made at the top of page 6 of the defendants' answer.

5. Replying to paragraph 7 thereof, with reference to the denial therein contained, the defendants are precluded from denying the allegations of paragraph 8 of the plaintiff's bill of complaint by reason of the admissions on the part of the defendant Brotherhood and the findings of the Court in said Illinois case as described at the top of page 6 of the defendants' answer. Further answering said paragraph, the plaintiff lacks information sufficient to form a belief with respect to the allegation that Edward B. Henslee died either on November 22, 1958 or any other date and accordingly, neither admits nor denies the same but leaves the defendants to their proofs thereof. The plaintiff further shows that the conduct with

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reference to solicitation and other matters described in the bill of complaint are applicable to whatever Regional Counsel or Legal Counsel may have been in office or associated with the defendant Brotherhood as described in the bill of complaint and that the allegations of the bill of complaint with reference to said Edward B. Henslee refer to whoever acted as Regional Counsel or Legal Counsel for the defendant Brotherhood with reference to said matters described in the bill of complaint.

6. Replying to paragraph 8 of the defendants's answer, the plaintiff shows that the defendants are precluded from the denials as to paragraph 9, 10 and 11 of the bill of complaint by reason of admissions made by the defendant Brotherhood in said case in the Illinois Supreme Court as cited at the top of page 6 of the defendants' answer and also for the Court findings in that case. The plaintiff further shows that the defendants have failed to set forth any reason or reasons as to the denial of the existence of the statute as quoted in paragraph 11 of the bill of complaint.

7. Replying to any further affirmative allegations contained in said answer to which reference has not specifically been made, the plaintiff denies the same.

Reply to First Affirmative Defense

Replying to the first affirmative defense, the plaintiff admits that the general subject matter here concerned was before the Supreme Court of the State of Illinois, along with various other matters relative to other areas, in the matter of an investigation as to the practices of the Brotherhood of Railroad Trainmen, etc.

The plaintiff denies the first paragraph under "first affirmative defense" and shows that said paragraph is not

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a correct representation to this Court with reference to the contents of the opinion in said Illinois case. The plaintiff further shows that in the opinion of of the Supreme Court of Illinois, with reference to the Brotherhood and its Regional Counsel, the Illinois Court recited that: "* * * its present practices and those of its regional counsel cannot be continued * * *"; the plaintiff further shows that the Illinois Court thereupon prescribed certain conditions and limitations on the conduct of the defendant Brotherhood.

The plaintiff further shows that the conduct of the defendant Brotherhood and its agents has been before the Courts of several states with reference to the same or similar practices as those at issue in this cause and that the conduct described has been held to be reprehensible.

The only other or further affirmative matters set forth in said purported first affirmative defense is reference to an alleged communication by the President of the defendant Brotherhood under date of March 16, 1959, appearing to instruct the membership to comply with the decree of the Supreme Court of the State of Illinois. However, the same is not a defense in this cause for the following reasons:

(a) Said communication does not direct compliance with all the matters at issue in this cause.

(b) There is no assurance that the membership of the defendant Brotherhood or the other defendants or any of them will in all respects comply with the terms of said alleged complication by the Presi-

dent of the defendant Brotherhood, either concurrently or at all times in the future.

(c) There is no assurance that the communication by the President of the defendant Brotherhood,

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as alleged, would not be reversed by this or a future officer of the defendant Brotherhood.

Further replying, the plaintiff shows that the conduct at issue in this cause, and even that conduct admitted in the defendants' answer, violates the statute in force in the State of Michigan as described in the bill of complaint and violates those principles effective within the State of Michigan with reference to the freedom of a claimant to select an attorney of his own choosing, without influence by organizations or persons in the capacity of the defendants in this cause, either by way of recommendation, urging the employment of particular counsel, conduct designed to secure cases for particular counsel, and otherwise.

The plaintiff shows therefore that the matters in this cause are not moot and that said purported first affirmative defense is not applicable.

Reply to Second Affirmative Defense

Replying to the purported second affirmative defense, the plaintiff denies that in the State of Michigan an injunction against a course of conduct which constitutes the commission of a crime is unlawful or constitutes a reason for non-issuance of such injunction.

The plaintiff further shows that this cause will assist in preventing multiplicity of proceedings within the State of Michigan as to each of the various occurrences of the

conduct concerning which complaint is made in this cause.

The plaintiff further shows that the conduct concerned herein violates both the statute to which reference is

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made in the plaintiff's bill of complaint and also those principles in force in the State of Michigan to which reference is made under the reply to the first affirmative defense as above set forth.

The plaintiff therefore shows that paragraph 11 of the bill of complaint should not be stricken, as prayed by the defendants, and further, that said purported second affirmative defense does not constitute a defense herein.

Reply to Third Affirmative Defense

Replying to the first sentence of the purported third affirmative defense, the plaintiff denies the averments therein contained and shows that the conduct concerned herein does violate the statute to which reference is made in the bill of complaint, violates those principles described in the reply to the first affirmative defense above, violates the laws of the State of Michigan, interferes and impedes with the orderly administration of justice in the State of Michigan and does infringe upon the rights both of the claimants concerned in the cases to which reference is made in these proceedings and also the rights of the plaintiff and the Courts of the State of Michigan.

Replying to the second sentence of the third affirmative defense, the plaintiff denies the conclusions therein contained.

Further answering said second sentence of the purported third affirmative defense, the plaintiff shows that the reference therein made to the Federal Employers'

Liability Act as derived from the Railway Labor Act, cited by the defendants as United States Code Annotated, Title 45, Sections 151 through 164, is an erroneous citation to this Court. The plaintiff shows that said Sections 151

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through 164 as cited by the defendants, deal with "rates of pay, rules and working conditions" as repeatedly described in those sections of said Federal Statute.

The plaintiff further shows that the defendants were and are well aware that the citation of those sections to this Court are not a defense of the conduct at issue in this cause for in said opinion of the Illinois Supreme Court as cited in the defendants' answer, the Illinois Court set forth that:

> "The Brotherhood defends its practices on legal grounds, and also argues that they are justified by policy considerations. As a matter of law it argues that its method of handling the personal injury and death claims of its members is permissible because under the Railway Labor Act the Brotherhood is authorized to represent its members, before the National Railroad Adjustment Board or other appropriate tribunals, in the processing of 'disputes growing out of grievances.' (45 U.S.C. 152). But these injury and death claims are not the kind of labor disputes that the statute contemplates. We find nothing to suggest that Congress intended by the Railway Labor Act, any more than by the Labor Management Relations Act, (29 U.S.C. 141) to overthrow State regulation of the legal profession and the unauthorized practice of the law."

Further replying, the plaintiff denies that the statute and principles and rules of law within the State of Michigan applicable to the conduct concerned herein, in any way conflicts with the Railway Labor Act or Federal Statute, with the Interstate Commerce Clause of the Con-

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stitution of the United States with Article I, Section 8 thereof, the Supremacy Clause of the Constitution, with Article VI, Clause 2, or otherwise conflict with Federal Statutes or the Constitution of the United States.

The plaintiff shows that said purported third affirmative defense is not available as a defense in this cause.

Wherefore, the plaintiff denying any other or further affirmative matters contained in said answer and affirmative defenses, the plaintiff prays that the plaintiff be granted that relief described in the plaintiff's bill of complaint.

State Bar of Michigan
By Phillip C. Kelley and
By J. Cameron Hall
General Counsel
State Bar of Michigan

Phillip C. Kelly,
301-4 Reynolds Building,
Jackson, Michigan;

J. Cameron Hall,
1323 Dime Building,
Detroit 26, Michigan,
Attorneys for Plaintiff.

[48, 49] (Jurats omitted in printing)

* * * * *

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PLAINTIFF'S STATEMENT OF CLAIM

(Filed April 11, 1961)

Plaintiff claims that defendant, the Brotherhood of Railroad Trainmen, and its members, officers and agents named herein, and as a class within the State of Michigan ever since 1930, have been engaged in a course of conduct which consists of organized solicitation of claims for injuries and/or death of railroad employees occurring in the course of their employment within the State of Michigan, such solicitation being for the benefit of out-of-state lawyers, particularly defendants Henslee and Naughton, named herein.

Plaintiff further claims that, as part of such organized solicitation, the solicitors are paid for their time and services, the Brotherhood of Railroad Trainmen is paid on an agreed basis, in consideration of designating said

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attorneys as the recipients of such solicited claims, and the injured employees and/or their survivors are provided with financial support while their cases are pending.

Plaintiff claims that the conduct of defendants as set forth in the bill of complaint is in violation of the criminal statutes of the State of Michigan, and the canons of ethics, as adopted by the Supreme Court of Michigan, that such conduct further interferes with, and impedes the orderly administration of justice, adversely affects the relationship between the legal profession and the public in the State of Michigan, and causes irreparable damage to property rights of the public, and the legal

profession, in the State of Michigan, and should be enjoined.

Phillip C. Kelly,
J. Cameron Hall,
Attorneys for Plaintiff.

Dated: May 27, 1960.

PRE-TRIAL SUMMARY BY THE COURT

(Filed April 11, 1961)

The parties hereto, by their respective counsel, appeared for pre-trial conference before this Court on May 27, 1960.

The pre-trial statement of claim of plaintiff was filed at that time, and subsequent thereto defendants' pre-trial statement of claim was also filed.

It appears that there is a possibility that a consent decree may enter in this cause against the defendant. The [64]

Brotherhood of Railroad Trainmen and all named defendants. (In this connection it is pointed out that Attorneys Edward B. Henslee, Jr., Martin K. Henslee, and John J. Naughton have declined to submit voluntarily to the jurisdiction of this court, they being nonresidents.)

In the event there is not a consent decree, defendants have been requested to advise what issue in Michigan is different than in the other states where consent decrees have entered.

It was also agreed that depositions of Mr. Whitney, with his files, and Mr. Maher and the three above-named attorneys may be taken; Mr. Whitney and Mr. Maher in Cleveland and the three attorneys either in Chicago or Detroit.

It was further agreed that the answer heretofore filed may stand as the answer to the plaintiff's amended declaration. (In this connection it is also pointed out that this Court is this date entering an order striking from the files and records of this case the appearances of the three above-named defendants and also striking the amended bill of complaint filed herein and reinstating the original bill of complaint of plaintiffs filed herein, so that the original answer may now stand as the answer to the original bill of complaint.)

It was further agreed that the Constitution of The Brotherhood of Railroad Trainmen as amended at the convention in 1954 may be admitted in evidence, including any amendments thereto, copies of which will be furnished by the defendants.

At the time of pre-trial it was also agreed that this cause should remain on the pre-trial docket and stand continued from day to day until June 10, 1959, prior to which time this Court was to be advised as to whether [65]

or not there would be a consent decree. This Court not having been advised that there would be a consent decree, this matter is hereby ordered transferred from the pre-trial to the trial docket.

(Signed) John C. Dalton
John C. Dalton, Circuit Judge.

Dated: April 11, 1961.

CONCISE STATEMENT OF DEFENSE
(Filed April 12, 1961)

Trainmen contend that the State Bar is attempting to enjoin BRT in Michigan on the basis of a bill of com-

plaint which alleges selected statements from the opinion of the Supreme Court of Illinois, Re. Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 NE 2d 163, as facts, though based solely on information and belief. Such a complaint is not proper. Hartingh v. Bay Circuit Judge, 176 Mich. 289, 142 N.W. 585, Ann. Cases 1915 B, 520. The matter is moot since the Trainmen are, and have been, in full compliance with the decision of the Supreme Court of Illinois. The State Bar of Michigan attempted to intervene in the said proceeding and evidence prepared by the State Bar was introduced in the said proceeding. The complaint is also deficient for want of equity in that neither the State Bar, nor the public of the State of Michigan have any property right in Federal Employers' Liability Act claims or cases arising out of railroad accidents occurring in Michigan. The right to practice law is not a property right. Ayres v. Hadaway, 303 Mich. 589, 6 N.W. 2d 905. Even if the public had property rights in these cases, the State Bar of Michigan [66]

is not the proper party to enforce those rights.

Plaintiff may not base its complaint on an alleged violation of the Michigan statutes because it is hereby attempting to enjoin the alleged commission of a crime and is patently attempting to deprive the defendants of their Constitutional right to a trial by jury. Even if a complaint could be validly based on the said statute, the allegations herein do not state a cause of action founded on that statute. The meaning and effect of that statute was considered and stated in Hightower v. Detroit Edison Co., 282 Mich. 1, 247 N.W. 97. There, the Supreme Court of Michigan states:

> "The rule of strict construction confines an offense to the words of the statute, but it permits the

words not only to be read naturally, but to be given a meaning in harmony with the purpose and intent of the law as far as may be done without distortion of language. Deloria v. Atkins, 158 Mich. 232, 241, 122 N.W. 559; People v. Gould, 237 Mich. 156, 163, 211 N.W. 346; Sutherland on Statutory Construction, Vol. 2 s 528 et seq.; 59 C. J. 1113 §660.

The purpose of the act is to discourage the practice commonly known as 'ambulance chasing'. The practice has developed recognized evils, the major of which are (1) fomenting litigation with resultant burdens on the courts and public purpose; (2) subornation of perjury; (3) mulcting of innocent persons by judgments, upon manufactured causes of action and perjured testimony, and by settlements to buy peace; and (4) defrauding of injured persons having proper causes of action, but ignorant of legal rights and court procedure, by means of contracts

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which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlements made for quick return of fees and against the just rights of the injured persons."

Finally, Trainmen contend that their rights in the premises are governed by Federal Statutes, the Federal Constitution, and considerations of public policy. Because of the said rights, Trainmen are entitled to have this action dismissed.

Respectfully submitted,

Arthur C. Lumley,
Attorney for Certain
Defendants,
1512 Dime Building,
Detroit, Michigan.

TRANSCRIPT OF TESTIMONY

Jackson, Michigan, June 27, 1961
10:13 o'clock a. m.

Before Honorable John C. Dalton, Circuit Judge.

*(2) Appearances: Phillip C. Kelly, Esq., 301-4 Reynolds Building, Jackson, Michigan, and J. Cameron Hall, Esq., General Counsel, State Bar of Michigan, 1323 Dime Building, Detroit 26, Michigan, for the plaintiff; Arthur C. Lumley, Esq., 1512 Dime Building, Detroit 26, Michigan, and Henslee & Henslee, Esqs., of counsel by Edward Henslee, Jr., Esq., and John J. Naughton, Esq., 139 North Clark Street, Chicago 2, Illinois, for the defendants.

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(3) The Court: Gentlemen, are you ready for this matter to be presented to the Court?

Mr. Kelly: The plaintiff is ready, your Honor.

The Court: Defense?

Mr. Lumley: Defense is ready.

The Court: Mr. Kelly?

Mr. Kelly: May I inquire if John J. Naughton is one of the partners of Henslee, Henslee & Naughton, who appears as counsel for the defendants here?

Mr. Naughton: Mr. Naughton is not a partner but he appears for the defendants. He is associated with the firm of Henslee & Henslee.

Mr. Kelly: In Chicago.

Mr. Naughton: In Chicago.

Mr. Kelly: May I inquire if anyone else from that firm or associated with that firm is here?

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*(2) refers to page of Transcript of Testimony.

Mr. Henslee, Jr.; I am Edward Henslee, Jr. I am here.

The Court: Are they of counsel in this matter?

Mr. Lumley: The order hasn't been entered, your Honor.

Your Honor has the opinion. I do not have a copy (4) of that order.

Mr. Kelly: May I refer to the answer to the bill of complaint filed by the defendants, in which Edward B. Henslee, Jr., Martin K. Henslee, and John J. Naughton, 139 North Clark Street, Chicago 2, Illinois, State 2-5925, and Arthur C. Lumley, 1512 Dime Building, Detroit 26, Michigan, Attorney for Defendants, Woodward 2-1490, appears as part of the record and files in this case?

Mr. Lumley: There is no contest about that, your Honor.

At one time I believe there was an order entered striking these parties.

The Court: That is right.

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Mr. Lumley: And then your Honor rendered an opinion in which you said that for comity they could be allowed to proceed as defendants, but we didn't enter an order on that.

So that I took the position, in view of the fact we didn't enter an order, that I could have them here to assist me in the trial of the matter, just like you would have another agent to assist you.

It doesn't make any difference to me. If the Court wishes to admit them right now as attorneys in this case, I would not have any objection.

Mr. Kelly: I think the—

Mr. Lumley: That was the reason I made that state- (5) ment.

Mr. Kelly: I think at no time were they refused the privilege as appearing as counsel here, and as I understand the record they are here as counsel for the defendant.

The Court: We are splitting hairs here.

Is there any objection to the record showing that they are here as of counsel?

Mr. Lumley: No.

The Court: Let the record so show.

Mr. Kelly: May it please your Honor, this cause is here this morning on the original bill of complaint and the answer of the defendants to the bill of complaint and the reply of the plaintiff to the defendants' answer.

In these pleadings the issues are to a considerable extent admitted. The allegations of the bill of complaint are admitted, to be more accurate.

And it is proposed on behalf of the plaintiff at the outset of this case to make an opening statement on the record delineating what issues are admitted in the pleadings. And in the course of this statement, to present documentary exhibits on the record so that the Court [70]

may have before it, insofar as it can be done, the facts which we ask the Court to find on the pleadings, following which we will present evidence as to the facts which are in dispute.

And for the benefit of the Court, this being a (6) chancery case, on behalf of the State Bar of Michigan, I think it is proper to summarize briefly the background

and history of this litigation and of this matter of the State Bar to this date, including the pleadings and issues here before the Court this morning.

Now, the matter which we are pursuing is, namely, the alleged unlawful solicitation through The Brotherhood of Railroad Trainmen, Legal Aid Department, of cases of Michigan residents, railroad employees and their survivors in the event of the death of those employees, which cases come under the terms and provisions of the Federal Employers' Liability Act; the solicitation of those cases through the operations of the Legal Aid Department of The Brotherhood of Railroad Trainmen who have certain attorneys—more specifically, have regional counsel of The Brotherhood of Railroad Trainmen, Legal Aid Department—whose territory includes the railroads in the lower peninsula of Michigan.

Now, this matter first came to light, at least to the knowledge of the State Bar of Michigan and myself as a member of that bar, in the form of a newspaper story which appeared in the local Jackson Citizen Patriot late in 1952, which contained—

Mr. Lumley: Just a moment. I object to any reference to something that would categorically be hearsay.

He could so mention the newspaper story.

(7) The Court: There is no objection to noticing it.

This Court will not take judicial notice of any newspaper story. It will not receive it in evidence, because it is hearsay.

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You have no objection to the record showing that is how it first came to your attention?

Mr. Kelly: All right.

It came to the attention of the City of Jackson and the attorneys practicing in Jackson, members of the Jackson County Bar Association, late in 1952, that the case of a local citizen employed by the New York Central Railroad had been handled by—

Mr. Lumley: Just a moment. I object to that again because now he is telling what is in the article, and that, I believe, is hearsay, your Honor.

Mr. Kelly: This is prefatory, your Honor please, to giving the Court the background of this case. There is no jury here. I do not ask the Court to consider it as any evidence in the case.

The Court: Let's keep in mind, gentlemen, we do not have any jury to impress here.

Let's get the facts before the Court so we can have this matter for disposition.

As a matter of fact, the Court is familiar with it, anyway, but I do not think it is properly before the Court.

(8) Mr. Kelly: I am going to elaborate on it.

The Court: Lets' go on. We have this coming to the attention of the State Bar in 1952 through a newspaper story which appeared in the Jackson Citizen Patroit.

Mr. Kelly: I may say to the Court that it had been the cause of some wonder why this type of case was never seen in this Court, and I think the records will show that no such case as an F. E. L. A. case has ever been in this court.

As a result of this newspaper publicity, the State Bar of Michigan appointed a committee to investigate what was going on in reference to the F. E. L. A. cases arising in Michigan.

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I was appointed chairman of the State Bar committee by President David Pence.

An investigation by our committee disclosed that there had been established by the B. of R. T. back in 1930, approximately, what was called a Legal Aid Department. The rational or the explanation for the creation of this department was expounded by the president of the B. of R. T. at that time. I will refer to that later as to the statements which were made as to why this Legal Aid Department was organized.

I think probably in deference and in reference to the Court's indicated statement that I will proceed without any further background to the state of the pleadings in this (9) case.

The Court: Very well.

Mr. Kelly: Referring only just briefly to those further matters.

The State Bar, after the disclosures made from the investigation our committee had produced, authorized a complaint to be made on behalf of the State Bar of Michigan to the Chicago Bar Association against the Henslee firm in Chicago, regional counsel of the B. of R. T. covering Michigan. That complaint was filed with the Chicago Bar Association in the year 1956 or 1957. I believe '56. And it was made at that time by a proceeding instituted by The Brotherhood of Railroad Trainmen in the Supreme Court of the State of Illinois, asking for approval of their methods of what we term solicitation in these F. E. L. A. cases.

The Supreme Court of Illinois appointed a commissioner to hold hearings and investigate the operations

and, following the report of the commissioner, the Supreme Court entered a decree disapproving their methods and operations and entering a decree to that effect, [73]

but at the same time stating that, inasmuch as the law had just been settled in Illinois, the complaints which were pending by the State Bar of Michigan and, I think, the Philadelphia Bar Association at that time against regional counsel in Chicago should be dismissed and not prosecuted.

(10) So that this proceeding was authorized by the State Bar, the instant proceeding here, to ask the Court for an injunction against the operations of The Brotherhood of Railroad Trainmen in Michigan. And that is the basis on which this case has come to court.

Now, in our bill of complaint, in paragraph 1, it is alleged that the State Bar of Michigan is a public body corporate, charged with the duty to aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in the State of Michigan.

The answer of the defendants admits paragraph 1.

And in paragraph 2 it is alleged that The Brotherhood of Railroad Trainmen is a national railway labor organization, with principal office in Cleveland, Ohio, but having branches, members, officers and agents throughout the United States, including the State of Michigan.

And the answer admits those allegations.

Paragraph 3 alleges: "That Frank J. Carr and L. M. Hasbrouck, of Jackson, Raymond Fieberkorn and

Thomas W. Fletcher, of Detroit, W. C. Coryell, of Okemos, L. E. Singer of Plymouth, E. V. Surdam, of Grand Rapids, H. F. McCall, of Birmingham, R. J. Johnson and L. A. Russell, of Durand, A. V. Grandstaff, of Dearborn, W. T. Ellsworth, of Allen Park, (11) R. J. Snow, of Melvindale, and William E. B. Chase, of Livonia, are

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members, officers and agents of defendant Brotherhood of Railroad Trainmen residing within the State of Michigan, and that there are other members, officers and agents of said defendant Brotherhood of Railroad Trainmen, within the State of Michigan, constituting a class so numerous as to make it impracticable to bring them all before the court, as to all of whom there are common questions of law and fact affecting their several rights and against all of whom a common relief is sought, as hereinafter shown."

The answer of the defendants admits that they are members, officers and agents of defendant Brotherhood of Railroad Trainmen (hereinafter called Trainmen) residing within the State of Michigan and further admit that there are others in like capacity within the state. Defendants deny all other allegations in paragraph 3.

In other words, the denial of the defendants there is the statement of the allegation that it constitutes a class so numerous as to make it impracticable to bring them all before the court. There are no questions of law and fact as to all of them.

In paragraph 4 of the bill of complaint it is alleged that in or about the year 1930 the Brotherhood of Railroad Trainmen organized and established a so-called Legal Aid Department as a division of said Brother-

hood of Railroad Trainmen, (12) representing, as reasons for organizing said Legal Aid Department, the following:

"Many lawyers frequently abuse the confidence of their clients by effecting low settlements in the case in order to obtain a higher settlement in some other case against the same railroad; incompetently preparing and processing such cases upon the law or the facts; not fully and fairly explaining to the [75]

client the terms of the employment, so that the client, after having assented to settlement, finds the proceeds thereof surcharged with items for expense of litigation, medical expenses, expenses of one sort and another or the like, which are not legitimate, or if legitimate, were not explained to him before the settlement was concluded, as well as in other ways.

"Adequate compensation cannot in general be exacted if members of the Brotherhood are persuaded by claim agents either to settle their own claims or to place them in the hands of incompetent, inexperienced or otherwise inadequate counsel.

"In 1930, A. F. Whitney, then President of the Brotherhood, in a public utterance to the Brotherhood's membership, declared that in his several years' experience as an officer of the Brotherhood, it had come to his attention that members who had been killed while engaged in railroad service had fared rather badly at the hands of railroad claim (13) agents in some instances, as well as at the hands of so-called ambulance-chasing lawyers, and that settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility

of the employers had been made with members of the Brotherhood who were either entirely devoid of their rights in such matters or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements."

The answer of the defendants admits "that in the year 1930 the Trainmen organized and established a department of the Trainmen designated as the 'Legal Aid Department.' Defendants admit that the representations

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alleged were stated, along with other representations, as factors to be considered in deciding whether a legal aid department should be established. Defendants deny all other allegations of paragraph four of the bill of complaint."

I point out to your Honor at this time that there are no other allegations in the complaint which would be covered by that denial. In other words, paragraph 4 is in effect admitted.

Paragraph 4, that is correct, is in effect admitted.

And then the defendants go on to say further in their answer, which is numbered 3 in the answer:

"Defendants aver that on a referendum questionnaire and ballot in 1930, the members of the lodges of the Trainmen (14) in the United States voted by a majority of eleven to one that a legal aid department should be organized.

"Defendants further aver that the said Legal Aid Department was thereupon organized as a part of or department of the defendant Trainmen and, as

constituted, was directly subject to the provisions of the Constitution of the Trainmen and to the authority of the president of the Trainmen.

"Defendants further aver that the title of the said Legal Aid Department was changed by order of the president of the Trainmen on or about January 1, 1959, and was redesignated as the 'Department of Legal Counsel.' Defendants aver that the title of the attorneys designated for the several regions was at the same time changed from 'Regional Counsel' to their present designation as 'Legal Counsel.'"

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Now, the plaintiff has filed a reply to these affirmative allegations, as follows:

"Replying to the affirmative allegations contained in the second, third and fourth paragraphs of paragraph 3 of the answer herein, this plaintiff is without information sufficient to form a belief with respect thereto and hence, neither admits nor denies the same but leaves the defendants to their proofs thereof."

In paragraph 5 of the bill of complaint it is alleged "that plaintiff is informed and believes, and therefore alleges as true, that the Constitution and By-Laws of the defendant (15) Brotherhood of Railroad Trainmen require, and the so-called Legal Aid Department of said Brotherhood of Railroad Trainmen has, ever since its formation, by and through its members, officers and agents, pursued and continues to pursue and engage in a well-organized and systematized solicitation, for so-called Regional Counsel, of claims and/or causes of action for personal injuries and/or death of railroad

employees arising under the Federal Employer's Liability Act, using the methods and practices, as follows:

> "A member representative of the Brotherhood, usually the Chairman of the Grievance Committee in the locale of the accident, calls upon the injured employee or his bereaved family, and not only explains to them that they can, but recommends and urges that they do consult with the Regional Counsel, and such representative urges said employees or survivors of the deceased employees not only to consult, but to retain Regional Counsel. Such employees or survivors of deceased employees are told that Regional Counsel will not charge in excess of

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> 25 per cent (25%) of the amount of any recovery, whether recovery be affected by suit or settlement, and that this percentage will include expenses incidental to the investigation and any litigation of the claim."

And in answer to that paragraph, the answer of the defendants is as follows:

> "Defendants deny each and every allegation contained (16) in paragraph five of the bill of complaint.
>
> "Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver

that some of the same members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five per cent (25%) of the amount of any recovery whether the recovery be effected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim.

"Defendants further aver that this representation of the fee charged has been eliminated by order of the president of the Trainmen contained in his letter to all lodges dated March 16, 1959, effective April 1, 1959, hereinafter set out in the First Affirmative Defense to this answer."

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This letter was dated, of course, after this action was started in this court. And our reply leaves them to their proof as to those allegations.

However, I point out to your Honor that it is here (17) admitted that the representative of the Brotherhood of Railroad Trainmen, Legal Aid Department. recommends that legal counsel be retained, which is the issue in this case alleged and admitted.

In paragraph 6 of the bill of complaint it is alleged that "Plaintiff is further informed and believes, and therefore alleges as true, that representatives of the Brotherhood of Railroad Trainmen are reimbursed for their time in bringing injured employees or the survivors of the deceased employees to the officers of the Regional Counsel. Reimbursement is at the member representative's hourly rate of pay on the railroad. Members rep-

resentatives are also reimbursed for any out-of-pocket expenses incurred in bringing injured employees or the survivors of deceased employees to Regional Counsel."

The answer of the defendants, number 5 of their answer, is as follows:

> "Defendant's admit the allegations of paragraph six of the Bill of Complaint as being in existence up to and including the 31st day of March, A. D., 1959."

Which was, as I have said, after the suit was filed.

> (Continuing reading) "Defendants further aver that the said compensation and reimbursement has been terminated under the previously mentioned order of the (18) president of the Trainmen dated March 16, 1959."

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Our reply to that answer is as follows:

> "Replying to paragraph 4 thereof—"

No, I have just referred to paragraph 5 but I neglected to read our reply to their paragraph 4, and I shall read it into the record at this time. (Reading):

> "The plaintiff shows that the defendants and each of them are precluded from denying the contents of the sub-paragraph under paragraph 5 of the Bill of Complaint, by reason of the admissions on behalf of the defendant Brotherhood and the findings of fact in a proceeding in the Supreme Court of the State of Illinois, to which proceeding and opinion reference is made at the top of page 6 in the defendants' answer, with reference to the matter an investigation as to the practices of the Brotherhood of Rail-

road Trainmen, etc., 13 Illinois, 2d 391; 150 Northeastern 2nd, 163.

"Replying to the second paragraph under paragraph 4 of the defendants' answer, the plaintiff shows that the admissions by the defendants therein set forth constitute solicitation of claims within the State of Michigan by the defendants or by part or all of the defendants and by the defendant Brotherhood, on behalf of the Regional Counsel or Legal Counsel of the defendant Brotherhood.

Replying to the third paragraph under Paragraph 4 of the defendants' Answer, the plaintiff shows that:

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(19) "(a) The alleged order by the President of the defendant Brotherhood dated March 16, 1959, is alleged by the defendants in this paragraph to apply to the representation as to the fee to be charged by the Brotherhood's Regional Counsel or Legal Counsel and does not cover the many other courses of conduct which are the subject of this cause.

"(b) There is no assurance that each and all of the members of the defendant Brotherhood will comply with the terms of such orders as may be issued by the President of the defendant Brotherhood.

"(c) There is no assurance that if there were an order by the President of the defendant Brotherhood as alleged, the same might not be reversed by either this or a future officer of the defendant Brotherhood.

"Replying to the affirmative matters set forth in Paragraph 5 of the answer, wherein the defendants admit the allegations of paragraph 6 of the bill of complaint up to March 31, 1959, the plaintiff shows that even if the President of the defendant Brotherhood disseminated a communication dated March 16, 1959, the same does not constitute a defense in this cause for the reasons that:

"(a) Said purported communication by the President of the defendant Brotherhood does not cover all of the matters concerned in this cause, nor is it alleged to cover all of the matters of conduct concerned in this (20) cause.

"(b) There is no assurance that each and all of the members of the defendant Brotherhood will

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comply with the terms of such orders as may be issued by the President of the defendant Brotherhood.

"(c) There is no assurance that if there were an order by the President of the defendant Brotherhood as alleged, the same might not be reversed by either this or a future officer of the defendant Brotherhood."

Now, in paragraph 7 of the bill of complaint alleges:

"Regional Counsel referred to above are attorneys selected by the defendant Brotherhood of Railroad Trainmen, in some fifteen 'regions' designated by said defendant to receive, through the methods and practices aforesaid, all Federal Employers Liability Act cases arising in their designated regions."

The answer of the defendants, carried under number 6 of their answer, says:

"Defendants deny each and every allegation of paragraph seven of the Bill of Complaint.

"Legal Counsel referred to above are attorneys designated by the defendant Trainmen in some seventeen regions designated by the said defendant as attorneys recommended for their qualifications and their integrity to be competent to prosecute claims arising under the Federal Employers' (21) Liability Act for members of the trainmen in their designated regions."

Our reply to that answer is as follows:

"Replying to the purported denials and affirmative allegations in Paragraph 6 of the defendants' Answer, the plaintiff shows that the second para-

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graph under paragraph 6, in effect, admits the type of conduct alleged in paragraph 7 of the plaintiff's Bill of Complaint. The plaintiff further shows that the defendants are precluded from denying the conduct described in paragraph 7 of the plaintiff's Bill of Complaint by reason of the admissions of the defendant Brotherhood and opinion of the Court in said Illinois case to which reference is made at the top of page 6 of the defendants' Answer.

Paragraph 8 of our bill of complaint alleges:

"The Lower Peninsula of the State of Michigan, is the 'region' of one Edward B. Henslee, an attorney, of Chicago, Illinois, and his associates, for whom defendants, or some of them actively solicit, by the methods herein outlined, all cases of personal injury or death of railroad employees occurring in the State of Michigan, as plaintiff is informed and believes and thereupon alleges as true."

The answer of the defendants, carried under number 7 of their answer, says:

"Defendants deny all of the allegations of para-
(22) graph eight of the Bill of Complaint except that they admit the Edward B. Henslee referred to at one time was the Regional Counsel for a region including the Lower Peninsula of the State of Michigan and that he had associates. Defendants further aver that the said Edward B. Henslee died on November 22, 1958."

Our reply to that answer is as follows:

"Replying to Paragraph 7 thereof, with reference to the denial therein contained, the defendants are

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precluded from denying the allegations of paragraph 8 of the plaintiff's Bill of Complaint by reason of the admissions on the part of the defendant Brotherhood and the findings of the Court in said Illinois case as described at the top of page 6 of the defendants' answer.

"Further answering said paragraph, the plaintiff lacks information sufficient to form a belief with respect to the allegation that Edward B. Henslee died either on November 22, 1958, or any other date and accordingly, neither admits nor denies the same but leaves the defendants to their proofs thereof.

"The plaintiff further shows that the conduct with reference to solicitation and other matters descriped in the Bill of Complaint are applicable to whatever Regional Counsel or Legal Counsel may have been in office or associated with the defendant Brotherhood as described in the Bill of Complaint

(23) and that the allegations of the Bill of Complaint with reference to said Edward B. Henslee refer to whoever acted as Regional Counsel or Legal Counsel for the defendant Brotherhood with reference to said matters described in the Bill of Complaint."

Paragraph 9 of the bill of complaint alleges that:

"Plaintiff further shows unto the Court, on information and belief, that, by and through the operations of the Legal Aid Department of the Brotherhood of Railroad Trainmen in the State of Michigan, large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen residing in Michigan and whose claims have arisen within the

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State of Michigan, have been unlawfully and improperly solicited by said Brotherhood of Railroad Trainmen Legal Aid Department, through its members, agents and officers, and have been directed into and handled by the office of Regional Counsel Henslee and associates in Chicago, Illinois, and elsewhere, to the extent that a majority of such cases are so solicited and so handled."

The defendants deny each and every allegation of paragraphs 9, 10, and 11 in their number 8 of their answer and, for reply, the reply as filed by the plaintiff sets forth as follows:

"Replying to Paragraph 8 of the defendants' Answer, the plaintiff shows that the defendants are precluded from (24) the denials as to paragraphs 9, 10 and 11 of the Bill of Complaint by reason of admissions made by the defendant Brotherhood in

said case in the Illinois Supreme Court as cited at the top of page 6 of the defendants' Answer and also for the Court findings in that case. The plaintiff further shows that the defendants have failed to set forth any reason or reasons as to the denial of the existence of the statute as quoted in paragraph 11 of the Bill of Complaint."

We have not, of course, read that as yet, but it is a penal statute of this state.

Paragraph 10 of the bill of complaint alleges:

"That such solicitation, on an organized and systematized basis, interferes with and impedes the orderly administration of justice, adversely affects the relationship between the legal profession in the State of Michigan and the public, and causes, and

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threatens to cause, irreparable damages to property rights of the public and the legal profession in the State of Michigan."

That is denied by the answer, as stated.

Paragraph 11 alleges that the methods of operation of the Legal Aid Department of the Brotherhood of Railroad Trainmen, as set forth above, violate the Penal Code of the State of Michigan, particularly Section 410 thereof, being Section 28.642 of Michigan Statutes Annotated, and it is quoted in its pertinent part in this paragraph, and I will (25) not read it into the record.

The Court: I see no need to. The Court will take judicial notice of that.

Mr. Kelly: Paragraph 12 alleges that matter in dispute in this case exceeds the sum of one hundred dollars, and in their answer the defendants deny that allegation.

Paragraph 12 then goes on to pray for relief by way of answer of the defendants and injunction from the conduct complained of, and I will not read that into the record because it is part of the bill of complaint.

So that there are affirmative defenses set forth, but that is a matter for the defendants to care for, I assume.

As the pleading stand, if the Court please, we believe that substantially all of the allegations of the bill of complaint, all of the material allegations in the bill of complaint, are admitted except as to paragraph 9 alleging that large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen residing in Michigan and whose claims have arisen within the State of Michigan, have been unlawfully and improperly solicited by said Brotherhood of Railroad Trainmen Legal Aid Department, through its members, agents and of-

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ficers and have been directed into and handled by the office of Regional Counsel Henslee and associates in Chicago, Illinois.

As to that matter, we propose to present proofs to (26) the Court; and, further, as to the statements made by the Brotherhood of Railroad Trainmen in its proceeding in the Illinois Supreme Court which are relied upon by the defendants and mentioned also in our reply.

(To the reporter): Will you mark this, please?

(The booklet referred to was marked "Plaintiff's Exhibit 1.")

Mr. Kelly: I would like to offer in evidence plaintiff's Exhibit 1 entitled "Motion for Leave to File Petition for this Court's Declaratory Judgment or Directive Order Concerning the Practice of Law in the Respects Set Forth in the Petition," filed in the Supreme Court of Illinois, November Term, A. D. 1955. In the Matter of the Petition of the Brotherhood of Railroad Trainmen; and W. P. Kennedy, President and a member thereof; on behalf of the members, thereof, Petitioners, number 33877, as certified to by Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois.

Mr. Lumley: Your Honor, I object to the proposed plaintiff's Exhibit 1 for the reason that my examination of it indicates that it is a petition of the Brotherhood of Railway Trainmen and, as such, it does not constitute testimony.

I do not see how just the pleadings of any particular case would be admissible in this case.

(27) The Court: Is it a part of the—

Mr. Lumley: It doesn't involve the same parties.

The Court: Is it a part of the record in the Illinois case?

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Mr. Lumley: It is a part of the record in the Illinois case, that's right.

The Court: It will be admitted, then.

Mr. Lumley: I would like to conclude my objection.

The Court: Go ahead.

Mr. Lumley: I believe that, as regards plaintiff's Exhibit 1, it is incompetent, irrelevant, and immaterial. It merely represents pleadings in a case rather than

testimony, and certainly it is not evidence of any testimony offered in that case, which would have to be used by counsel for impeachment purposes.

Mr. Kelly: I would like to read into the record from plaintiff's Exhibit 1 the following pages, 6 and 7, of the exhibit:

> "Under the Brotherhood's constitution, by-laws and other action approved by its membership, when a member is injured or killed in railroad operations, it is not only the right and privilege but the duty and obligation of member representatives of the Brotherhood, usually the Chairman of the Grievance Committee in the locale of the accident, to call upon the injured member or his bereaved family, and not (27) only explain to them that they can but recommend and urge that they do consult with the Regional Counsel and his associates. The representative informs them that (as is the fact) such consultation does not require them to retain Regional Counsel and will entail no financial obligation upon them unless they do retain such Counsel. There is no disavowal, however, of the fact that representatives do in fact not only urge members or survivors of the deceased members not only to consult, but to retain, Regional Counsel. Members are told
>
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>
> (as is the fact) Regional Counsel are not permitted to and will not charge in excess of 25% of the amount of any recovery, whether recovery be effected by suit or settlement, and that this percentage will include expenses incidental to the investigation and any litigation of the claim."

Mr. Lumley: Will you read the date of that petition, counsel, so we have it in the record?

Mr. Kelly: It does not appear to be dated, Mr. Lumley.

It says: "Respectfully submitted," signed "Brotherhood of Railroad Trainmen (A national railway labor union); W. P. Kennedy, President of the Brotherhood, By William C. Wines, Attorney for Petitioners."

It is filed in the November Term, A. D. 1955, of the Supreme Court of Illinois.

(28) Otherwise, it is not dated.

The Court: Does that cover your point?

Mr. Lumley: Yes, sir.

The Court: Very well.

Mr. Kelly: Reading further from page 7 of the exhibit:

> "Local Chairmen, or other member representatives of the Union, are reimbursed for their time in bringing injured members or the survivors of deceased members to the offices of Regional Counsel. In many instances member representatives of the union are employed to investigate claims, it having been found that their acquaintance with fellow-employee witnesses and their conversance with railroad operations make them, for many cases, the best investigator. Reimbursement is at the member rep-

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> sentative's hourly rate of pay on the railroad, is made immediately, and is wholly independent of whether any money is recovered upon the claim or not. Member representatives are also reimbursed

for any out-of-pocket expenses incurred in bringing injured members or the survivors of deceased members to Regional Counsel and in investigating the case. Such reimbursement is likewise independent of the result of any claim."

Reading further at the top of page 6 of the exhibit, your Honor:

"Edward B. Henslee, a Chicago lawyer, is General (29) Counsel for the Brotherhood and is one of the 15 Regional Counsel. He has offices in Chicago."

The Court: Is there going to be considerable reading from this next exhibit?

Mr. Kelly: No, your Honor.

The Court: Why, if there was, we better give the reporter a break here.

Mr. Kelly: Will you mark this, please?

(The booklet referred to was marked "Plaintiff's Exhibit 2.")

Mr. Kelly: Exhibit 2 is offered in evidence.

Mr. Lumley: Defendants object to the admission of plaintiff's proposed Exhibit 2 in evidence on the ground that it is incompetent, irrelevant, and immaterial. It contains conclusions of the pleader. It was not testimony.

Particularly, I direct the Court's attention to the fact that the date of this particular pleading is the November Term, as far as I can tell here, 1955, which, of course,

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from the standpoint of laying the foundation for the relief that the plaintiff seeks, is incompetent, irrelevant,

and immaterial because it is better than five years ago, and it does have no bearing upon whether the practices that are alleged to have been contained in the plaintiff's Exhibit 2 are now in operation.

Mr. Kelly: It is in the same category as Exhibit 1, (30) your Honor, another petition, an accompanying petition filed by defendant, The Brotherhood of Railroad Trainmen, in the Supreme Court of Illinois.

The Court: Let me ask you this: This is a part of the record of the Illinois case, Mr. Lumley?

Mr. Lumley: Of course, he is the one that is offering it, but I presume it is a part of the record, yes, your Honor.

The Court: Well, so far as you know.

Mr. Lumley: As far as I know, it is a part of the record.

The Court: It may be admitted.

Mr. Lumley: But I—

The Court: I understand.

Mr. Lumley: I want the Court to realize I am objecting to the record of the Illinois case.

The Court: I understand.

Mr. Kelly: Exhibit 2 is entitled: "Petition for This Court's directions with Respect to the Representation by Attorneys of Members of The Brotherhood of Railroad Trainmen and the Survivors of Deceased Members Arising Under the Federal Employer's Liability Act and the Railway Labor Act."

Filed: "In the Matter of the Petition of the Brotherhood of Railway Trainmen; and W. P. Kennedy, Presi-

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dent (31) and a member thereof; on behalf of the members, thereof, Petitioners."

Filed: "In the Supreme Court of Illinois, November Term, A. D. 1955," being number 33877; and reading specifically from page 7 of the exhibit as follows:

> "Edward B. Henslee is both the General Counsel and one of the Regional Counsel for the Brotherhood, as Regional Counsel represents the interests of the Brotherhood and its members with respect to the following segments of the following railroads, respectively."

Now, without reading further, I will just refer to the fact that defendant includes all or portions of the states of Indiana, Ohio, Illinois, Pennsylvania; and as to Michigan, reading again: "All employees of railroads except those which run into the upper peninsula of the state."

The Court: I think at this time we better take a ten-minute recess.

(A brief recess was taken.)

Mr. Kelly: If the Court please, that concludes our presentation under the heading of issues in dispute, and we will refer to Mr. Lumley if he cares to make an opening statement. If not, we are prepared to proceed with our proof under paragraph 9 which is in dispute.

The Court: Mr. Lumley, do you wish to or do you wish to reserve it?

(32) Mr. Lumley: I didn't know that was an opening statement, your Honor.

I thought he started on his case. He read those things in the record as evidence, and Plaintiff's Exhibit 1 and

Plaintiff's Exhibit 2 were admitted in evidence as exhibits in the case.

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Mr. Kelly: That is right; they are matters—

Mr. Lumley: That is not an opening statement. That is embarking upon his own case.

I am content now to continue with his own case and I will reserve my rights to make an opening statement at the time when we start in ours if the Court will permit me.

The Court: Very well.

Mr. Kelly: I offered Exhibits 1 and 2. They are part of the pleading in the Illinois Supreme Court on behalf of the defendant Brotherhood, as explanatory of the matters which are, we admitted in the pleadings; but as a different—the statements published in those records which are also in the pleadings. We haven't offered any proof as to disputed matters. We do not intend to. However, we are ready to go ahead with proof if counsel does not want to make an opening statement.

Mr. Lumley: If counsel is now saying that what he has done heretofore constitutes an opening statement of his claim, then I move that all of it be stricken for the reason (33) that an opening statement is a statement made by counsel as to what he intends to show and does not constitute evidence and is not testimony.

What he did in this particular case was to introduce into evidence two exhibits over my objection, which certainly constitutes not an opening statement but evidence received by the Court in substantiation of his claims in his bill of complaint, and I ask that it be stricken.

Mr. Kelly: I don't know whether Mr. Lumley was listening or not.

Mr. Lumley: I was.

Mr. Kelly: But I stated to the Court that those mat-
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ters were not in dispute and were admitted in the pleadings, and I was going to state them in the record for the purpose of assisting the Court in making the findings of facts.

We are ready to go ahead.

The Court: Let's get on with the proofs.

Mr. Kelly: With our proofs, if counsel doesn't want—

Mr. Lumley: May I have a ruling on my motion to strike?

The Court: Your motion to strike is denied.

(34) WALSH, DAVID J., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Kelly: For the purposes of the record, if your Honor please, and in opposition to the motion as made by the defendants, I would like to re-offer at this time in evidence plaintiff's Exhibits 1 and 2 and ask that they be received in the record at this time.

Mr. Lumley: Same objections.

The Court: Same ruling.

Mr. Lumley: Everything is the same.

The Court: We are saving time.

Mr. Kelly: Are the exhibits received at this time, your Honor please?

The Court: Yes.

Mr. Kelly: Thank you.

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Direct Examination

By Mr. Kelly:

Q. What is your name, please?

A. My name is David J. Walsh.

Q. W-a-l-s-h?

A. Yes, sir.

Q. Where do you live, Mr. Walsh?

A. I live in Chicago, Illinois.

Q. What is your occupation?

A. I am supervisor of the clearing house for the Claims Research (35) Bureau, General Claims Division, of the Association of American Railroads.

Q. And is the Association of American Railroads a national organization?

A. Yes, sir.

Q. Who comprises that association?

A. Railroads operating in the United States.

Q. And how long have you occupied your position with that organization?

A. Since July 1, 1953.

Q. Will you state whether or not the business of that organization includes the keeping of records of claims filed against railroad members of the organization?

A. It does.

Q. And whether or not the keeping of those records is under your supervision?

A. It is, yes.

Q. And has been since July 1, 1953?

A. Yes.

Q. Is it the regular course of your business to keep those records?

A. It is, yes.

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Q. I will ask you whether or not you have with you records of claims of Michigan residents under the Federal Employers' Liability Act against railroad members of the Association of (36) American Railroads.

A. Yes, I do.

Q. Will you produce them?

A. Yes. I have them right here.

Q. Now will you refer to these records and tell the Court what period of time they cover?

A. Yes. I have a group of cards here which covers cases reported during the period July 1, 1953, to March 31, 1955.

Mr. Lumley: May I ask that that testimony be stricken relating to any cards he may have between the years 1953 and 1955 on the grounds that as far as the issues in this case are concerned they are incompetent, irrelevant, and immaterial?

This case is being tried in 1961 for alleged things that happened in 1961, if they predicate that testimony upon what they want to seek an injunction in the future.

Mr. Kelly: The only issue in this case as we see it. Mr. Hall and myself for the plaintiff, is whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal aid department. That is

placed in issue in our bill and denied by the answer, and this is evidence offered in support of the bill.

The Court: It may admitted.

(37) Q. (By Mr. Kelly): You have identified records covering the period of July 1, 1953, to March 31, 1955, is that so?

A. Yes, that's correct.

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Q. I am holding in my hand a number of cards on which are typed this legend: "F. E. L. A. cases involving Michigan residents reported to Claims Research Bureau during period July 1, 1953, to March 31, 1955."

Is that so?

A. Yes, that's correct.

Mr. Lumley: May I ask a question if he seeks to admit that in evidence, your Honor?

The Court: I do not think he has offered them yet.

I assume it is going to be marked as an exhibit but it has not been offered yet.

Mr. Kelly: Will you mark these, please?

(The group of cards referred to was marked "Plaintiff's Exhibit 3.")

Q. (By Mr. Kelly): Are these records kept under your supervision, Mr. Walsh?

A. Yes, they are.

Q. Are they made and kept in the regular order of your business and in the regular course of your business?

A. Yes, they are.

Q. Is it the regular course of your business to keep such records?

A. Yes, it is.

(38) Mr. Kelly: Will you mark this, please?

(The group of papers referred to were marked "Plaintiff's Exhibit 4.")

Q. (By Mr. Kelly): I will show you plaintiff's Exhibit 4, Mr. Walsh, and ask you what that is.

Mr. Lumley: Well, I think that will have to be identified so that you can offer it in evidence before you take testimony. It may be inadmissible.

Mr. Kelly: Thank you, Mr. Lumley. That is what I am asking him.

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The Court: He is going to identify them. That was the question.

A. This is a listing of each of the cards which are in this exhibit.

Q. (By Mr. Kelly): This is a compilation of the pertinent information which is contained in the cards constituting plaintiff's Exhibit 3?

A. That's correct.

Q. Made for the convenience of the Court?

A. Yes, it is.

Q. Who made that schedule?

A. I made that personally.

Q. You made it personally?

A. Yes.

Q. It refers to these cards, Exhibit 3, is that right?

(39) A. Yes.

Mr. Kelly: Now, for the purpose of convenience, we offer plaintiff's Exhibit 4 in evidence, which the witness

has testified was made personally by him from his original records.

We will tender those records, Exhibit 3 for the use of counsel for the defendants if he cares to see them, and we will offer Exhibit 3 also. For whatever purpose. But we thought it would be less cumbersome in the file to offer the compilation.

The Court: I think it is apparent, the reason for it; so if you will let counsel examine them perhaps we can agree on something here.

Mr. Kelly: We offer plaintiff's Exhibits 3 and 4.

Mr. Lumley: May I ask a question now on Exhibit 3?

Mr. Kelly: Yes.

The Court: Go ahead.

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Q. (By Mr. Lumley): Mr. Walsh, where did you get the information that is listed on the cards which constitute plaintiff's Exhibit 3?

A. It is supplied by the railroads.

Q. In other words, these cards merely reflect information that was given to you from the record of the independent railroad?

A. Yes.

(40) Q. So that the original records which represent the information that is listed on plaintiff's proposed Exhibit 3 are with the original railroads that settled the claims?

A. Yes.

Mr. Lumley: I object to it, your Honor, on the ground that it is not the best evidence, Exhibit 3.

Mr. Kelly: Your Honor please, this is offered under Section 27.902, Michigan Statutes Annotated, the business-records-evidence statute, which insofar as material here reads as follows:

> "Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court in proof of said act, transaction, occurence or event if it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but not its admissibility."

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It is the business of the—and has been so testified —the regular course of business of the Association of (41) American Railroads to keep such records. They are made under the supervision of this witness in the regular course of their business, and it is the regular course of business to make them and keep them as records. And it is clearly admissible under the statute.

Mr. Lumley: The court has ruled numerously that the so-called shop-book rule, which I believe is what counsel refers to, was not designed to render admissible that which has been heretofore inadmissible.

All of these railroads have original records of claims that they have settled or of the suits that have been

started, and those original records are kept by them; so that the so-called plaintiff's Exhibit 3 is merely a compilation of records that are in the original railroads in the first instance. and those records would be the best evidence of what they contain. It would appear to me.

That is why I make my objection.

Mr. Kelly: Here is an association of all the railroads, your Honor, whose very business is the keeping of these records, and it has been testified that they are so kept; and the objection which counsel has made of the lack of personal knowledge doesn't affect their admissibility.

It would not be possible to bring in every person who knows about the facts of this instance.

Mr. Lumley: I would like to supplement, if I may, (42) my objection, your Honor, which is on an entirely different ground and concerns both Exhibit 3, apparently, and Exhibit 4, since Exhibit 4 is supposed to be, for convenience, a compilation of the cards in Exhibit 3.

The Court: Go ahead.

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Mr. Lumley: Looking at Exhibit 4, I find that there has been a certain number of cases allegedly instituted or handled in Michigan and handled in the State of Illinois.

Now, the so-called Michigan cases have been handled by many law offices. As is shown here, Cary & BeGole; Carl Gussin, and so forth.

As to that portion of the claim, I make my objection on the grounds that it is not in any way binding upon us. It would not be material in these particular proceedings which are directed to the parties involved.

May I show your Honor what I mean?

Mr. Kelly: I might say to your Honor that that is only one of our exhibits and it will be extended right down to the present time; and, of course, we do not claim anything for any of the other names on there excepting the ones we are referring to in this case, and we are prepared to demonstrate their participation from the entire exhibits.

The Court: I think the exhibit speaks for itself.

Naturally, the defendants cannot be bound by the litigation which on the face of this exhibit was not handled by (43) their firm.

That is your point, is it not?

Mr. Lumley: Yes, your Honor.

The Court: I do not think there is any question about that.

Mr. Kelly: We claim nothing for that.

The Court: Very well, we will receive the evidence under the rule, Section 27.902.

Well, go ahead, Mr. Kelly.

Mr. Kelly: Plaintiff's Exhibit 4 is entitled: "Settlements in F. E. L. A. Cases Involving Michigan Residents Reported to Claims Research Bureau During Period April 1, 1955, to December 31, 1955."

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I think I have picked the wrong exhibit.

I would like to straighten it out.

We inadvertently picked a compilation covering a period April 1, 1955, to December 31, 1955, and had it marked "Plaintiff's Exhibit 4" as being taken from plaintiff's Exhibit 3 which covers a different period of time.

I would like to withdraw plaintiff's Exhibit 4 and have it stricken from the record for the time being and substitute for it and offer in evidence a similar compilation covering the same period as Exhibit 3.

The Court: I see no objection to that.

Mr. Kelly: Will you mark this, please?

(44) (The substituted group of papers referred to was re-marked "Plaintiff's Exhibit 4".)

Q. (By Mr. Kelly): Now showing you corrected plaintiff's exhibit 4, Mr. Walsh, I will ask you whether that is a compilation of settlements in F. E. L. A. cases involving Michigan residents reported to the Claims Research Bureau during the period July 1, 1953, to March 31, 1955.

A. Yes it is.

Q. Was that compilation or schedule prepared by you personally?

A. Yes.

Q. From the records constituting plaintiff's Exhibit 3 in your office?

A. Yes.

Mr. Kelly: May it be received in evidence?

The Court: I think you better submit it to counsel.

Mr. Kelly: Covering a different period of time.

Mr. Lumley: May I ask one question in regard to this, your Honor?

Q. (By Mr. Lumley): Mr. Walsh—

A. Yes.

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Q. (Continuing):—when did you start this particular organization of which you are a member?

A. It was begun on July 1, 1953.

Q. So that I notice in this exhibit here, the proposed Exhibit 4 that you have, refers to years long prior to the time when you (45) were organized as an association.

A. Yes.

Q. 1947, 1948, 1949, 1950, 1951, 1952?

A. That's right.

Mr. Kelly: What are you referring to, Mr. Lumley?

Q. (By Mr. Lumley): Pages 4 to 5. As representing the years before you were even organized at all?

A. That's correct.

Q. You did't even keep records yourself of these years, did you?

A. Those were reports came to our attention.

Q. But you didn't keep records at all of these years, did you, in the ordinary course of your business, because you were not in business?

A. We were not in business at the time.

Mr. Lumley: I object to that exhibit, your Honor; at least to the extent that I brought out.

Mr. Kelly: Let me ask the witness this further question: Was the Association of American Railroad organized before 1953?

A. Yes, it was.

Q. (By Mr. Kelly): When was that organized?

A. I believe it was approximately 1921 or 1922.

Q. And the keeping of records in your office under the research claims division that you are supervisor of commenced on July (46) 1, 1953?

A. Yes.

Q. Is that correct?

A. That's right.

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Q. You have assembled these records since that time as records—

Mr. Lumley: I think the questions are very leading, your Honor.

Mr. Kelly: All right.

The Court: Yes.

Rephrase it, Mr. Kelly.

Q. (By Mr. Kelly): You have kept records as part of the business of the Association of American Railroads' bureau of which you are an employee as furnished to you by members of the—by railroads constituting the membership of the Association of American Railroads. Is that correct?

A. Yes.

Q. Has it been part of the job to analyze these claims matters in your department?

Mr. Lumley: Objected to as leading.

Q. (By Mr. Kelly): What I am getting at is: Why did you keep this record for the prior years before the office that you are connected with started? Why did you keep these records?

A. They are more or less of historical significance.

Mr. Kelly: I think it all goes to the point that we are interested in here, that we are trying to direct the (47) Court's attention to: that these cases have been going into these offices even before the time when this particular office made the compilations, and they have made this

compilation from records which have been furnished to them and are equally admissible under the statute.

Mr. Lumley: I would like to have the record show that I renew my objection that I originally made to the mistaken plaintiff's Exhibit 4 in reference to this Exhibit 4.

The Court: Your objection is denied. The exhibit may be admitted and, of course, the weight of it is for the Court.

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Mr. Kelly: Will you mark this, please?

(The group of papers referred to was marked "Plaintiff's Exhibit 5.")

Q. (By Mr. Kelly): I will show you plaintiff's Exhibit 5, Mr. Walsh, and ask you whether those are the records of claims F. E. L. A. cases, involving Michigan residents reported to the claims research bureau during the period April 1, 1955, to December 31, 1955.

A. Yes, they are.

Q. To shorten the record, are all of those records which you have in front of you, including plaintiff's Exhibits 3 and 5 and the others, of a similar nature kept in the regular course of your business?

A. Yes, they are.

(48) Q. Is it the regular course of your business to keep these records?

A. Yes, it is.

Mr. Lumley: What years do they cover, Mr. Kelly?

Mr. Kelly: April 1, 1955, to December 31, 1955.

(To the reporter): Will you mark this, please?

(The papers referred to were marked "Plaintiff's Exhibit 6".)

Q. (By Mr. Kelly): Did you also make a schedule of the contents of the cards constituting Exhibit 5, Mr. Walsh?

A. Yes, I have.

Q. Showing you plaintiff's exhibit 6, is that the schedule?

A. Yes, it is.

Q. Was that made by you from the records of exhibit 5?

A. Yes, it was.

Mr. Kelly: Plaintiff's exhibits 5 and 6 are offered in evidence.

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Mr. Lumley: I wish to make the same objection to exhibit 5, that it is—I assume it is not the best evidence because you secured it the same way, did you not, Mr. Walsh?

A. Yes, that's true.

Mr. Lumley: So I object to exhibit 5 on the ground, first, that it is not the best evidence; secondly, that it is incompetent, irrelevant, and immaterial because it covers a period of time long prior to the issues that are involved in (49) this case.

As to Exhibit 6, I might ask one other question of the witness if I may, your Honor.

The Court: Go ahead.

Q. (By Mr. Lumley): Does this cover or do your records show where the accidents happened in these cases?

A. Yes, the records show that.

Q. I mean do the cards—

A. (Interrupting): Yes, the cards also.

Q. And Exhibit 4 and Exhibit 5 reflect where the accidents happened?

A. Yes.

Q. I note, for instance,—I am just taking a card out of the proposed Exhibit 5, and I see the accident happened January 10, 1954, at Chicago, Illinois.

A. May I see the card? Yes, that's correct; it happened in Chicago.

Mr. Kelly: Go ahead, answer the rest of the question.

The Witness: But the address of this claimant is shown as Holland, Michigan, which would make it come within that summary I gave you.

Mr. Lumley: I object to plaintiff's Exhibit 6 on the grounds that it does not represent the best evidence of the contents or of the information it purports to contain,

[107]

(50) and, because it covers certain years far prior to the issues involved in this case, I contend it is incompetent, irrelevant, and immaterial.

The Court: For the same reason as stated with reference to Exhibits 3 and 4, the objection is denied and the exhibits may be admitted.

Q. (By Mr. Kelly): We have taken the record down to December 31, 1955.

Do you have records with you covering the same matters during the year 1956?

A. Yes, I do.

Mr. Kelly: Will you mark these, please?

(The group of cards referred to was marked "Plaintiff's Exhibit 7".)

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 7, I will ask you, Mr. Walsh, whether those are records of F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the year 1956.

A. Yes, they are.

Q. From those records have you made a schedule containing the information in those records for use here in court?

A. Yes, I have.

Mr. Kelly: Will you mark this, please?

The papers referred to were marked "Plaintiff's Exhibit 8".)

(51) Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 8, I will ask you whether that is the schedule of information you have made from the records in Exhibit 7.

A. Yes, it is.

Q. Covering the calendar year January 1, 1956, to December 31, 1956?

A. Yes.

[108]

Mr. Kelly: Plaintiff's Exhibits 7 and 8 are offered in evidence.

Mr. Lumley: I would like to renew my same objection to Plaintiff's Exhibit 7 and Plaintiff's Exhibit 8, and I assume the Court will render the same ruling.

The Court: The Court will make the same ruling, and the exhibits may be admitted.

Gentlemen, I think we better stop for lunch.

At this time this court will stand recessed until one-thirty.

(A recess was taken until one-thirty o'clock p. m.)

(52) *Afternoon Session*

The Court: Mr. Kelly.

You have already been sworn, so just take the stand, Mr. Walsh.

WALSH, DAVID J., called as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination (continued)

By Mr. Kelly:

Q. Mr. Walsh, do you also have with you records of F. E. L. A. cases involving Michigan residents reported to your claims research bureau during the year 1957?

A. Yes, I do.

Mr. Kelly: Will you mark these, please?

(The group of cards referred to were marked "Plaintiff's Exhibit 9.")

Q. (By Mr. Kelly): I will show you Plaintiff's Exhibit 9 and ask you if these are the records we just referred to.

[109]

A. Yes, sir.

Q. Have you made a schedule of the contents of Exhibit 9 for the use of the Court in this case?

A. Yes, I have.

Mr. Kelly: Will you mark this, please?

(The group of papers referred to were marked "Plaintiff's Exhibit 10.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 10, I will ask you whether that is a schedule of settlements in F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the period January 1, 1957, to December 31, 1957.

A. Yes, it is.

Q. Is that prepared by you?

A. Yes, it was.

Q. From Exhibit 9?

A. Yes.

Mr. Kelly: Plaintiff's Exhibits 9 and 10 are offered in evidence.

Mr. Lumley: Same objections, your Honor.

The Court: Very well, the Court will make the same rulings as on Exhibits 3 to 8 inclusive, and the exhibits will be admitted.

Q. (By Mr. Kelly): You have with you the records of F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the year 1958?

A. Yes, I do.

Mr. Kelly: Will you mark these please.

(The group of cards referred to were marked "Plaintiff's Exhibit 11.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 11, I will ask (54) you whether those are the records from your office as just referred to for 1958.

A. Yes, they are.

[110]

Q. Have you made a schedule of the contents of Exhibit 11 for the use in this court?

A. Yes, I have.

Mr. Kelly: Will you mark these, please?

(The papers referred to were marked "Plaintiff's Exhibit 12.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 12, I will ask you if that is a schedule of the information contained in Plaintiff's Exhibit 11.

A. Yes, it is.

Mr. Kelly: Exhibits 11 and 12 are offered.

Mr. Lumley: For the record, your Honor, the same objections.

The Court: Same objections, and the same ruling by the Court.

Let's understand each other. When we say "same objections" and "same rulings," it is with reference to these cards and the schedule prepared pursuant thereto.

Mr. Lumley: Yes, your Honor.

Q. (By Mr. Kelly): Do you have with you the records of F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the year 1959?

(55) A. Yes, I do.

Mr. Kelly: Will you mark these, please?

(The group of cards referred to was marked "Plaintiff's Exhibit 13.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 13, I will ask you whether those are the records referred to.

A. Yes, they are.

Q. And whether or not you made a schedule of the information contained in those records for the use of the Court.

[111]

A. Yes, I have.

Mr. Kelly: Will you mark these, please?

(The papers referred to were marked "Plaintiff's Exhibit 14.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 14, I will ask you whether that is a schedule of settlements in F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the period of January 1, 1959, to December 31, 1959.

A. Yes, it is.

Q. Made by you from the records contained in Plaintiff's Exhibit 13?

A. Yes.

Mr. Kelly: Exhibits 13 and 14 are offered in evidence.

Mr. Lumley: Same objections in this case that I (56) made in all the other cases, your Honor, and I want to supplement my objection by including the fact that Exhibits 13 and 14 refer to cases handled during the period of January 1, 1959, to December 31, 1959, and I call your Honor's attention to the fact that that period of time, I believe, is after the petition in this case, or the bill of complaint, was filed.

Mr. Kelly: They are all offered—

Mr. Lumley (interrupting): Therefore, I claim that that is incompetent, irrelevant, and immaterial. It is not

covered by the pleadings in this case nor the issues that have been developed in this case.

Mr. Kelly: They are all offered as showing a course of conduct on the part of the defendants, persisting in the face of this pending injunction suit against them.

The Court: The exhibits will be admitted. The objection is denied.

Q. (By Mr. Kelly): Do you have with you records of your office of F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the year 1960?

[112] A. Yes, I have.

Mr. Kelly: Will you mark these, please?

(The group of cards referred to was marked "Plaintiff's Exhibit 15.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 15, I will ask you if those are the records just referred to.

(57) A. Yes, they are.

Q. Have you made a schedule of the information contained in Plaintiff's Exhibit 15?

A. Yes, I have.

Mr. Kelly: Will you mark these, please?

(The papers referred to were marked "Plaintiff's Exhibit 16.")

Q. (By Mr. Kelly): Now, showing you Plaintiff's Exhibit 16, I will ask you whether that is the schedule of settlements in F. E. L. A. cases involving Michigan residents reported to the claims research bureau during the period January 1, 1960, to December 31, 1960, taken from the records constituting Plaintiff's Exhibit 15.

A. Yes, it is.

Mr. Kelly: Exhibits 15 and 16 are offered in evidence.

Mr. Lumley: Same objection, your Honor, including the further objection that it covers a period of January 1, 1960, to December 31, 1960, which is definitely much later than the issues that were created here in the suit.

The Court: In other words, the same objections as to Exhibits 13 and 14.

The objection will be denied and the exhibits admitted.

Q. (By Mr. Kelly): So that the record will be complete, as I (58) understand it, Mr. Walsh, is it your testimony that these card records, Plaintiff's Exhibits 3, 5, 7, 9, 11, 13 and 15, are records in the office of the Association of American Railroads kept in the regular course of business?

[113]

A. Yes, they are.

Mr. Lumley: That is repetitious. That has all been asked and answered.

Mr. Kelly: If it has, I just wanted to make sure it is.

The Court: I don't recall.

Go ahead and answer the question. I don't recall if it was.

Q. (By Mr. Kelly): The answer is yes?

A. The answer is yes.

Q. Whether it is the regular course of business of the Association of American Railroads to keep such records.

A. Yes, it is.

Q. So kept under your immediate supervision?

A. Yes.

Q. The corresponding exhibits of the schedules taken from those records were made by you personally?

A. Yes, they were.

Q. From those records?

A. That's correct.

Q. Now, I will ask you, Mr. Walsh, whether or not you have made (59) a summary of the cases and settlements from those records in your office during the period July 1, 1953, to December 31, 1960?

A. Yes, I have.

Q. Was that made by you personally?

A. Yes, it was.

Q. From your records in your office?

A. Yes.

Mr. Kelly: Will you mark this, please?

(The paper referred to was marked "Plaintiff's Exhibit 17.")

Q. (By Mr. Kelly): That is, the records, Plaintiff's Exhibit 3 through 15 inclusive?

A. That's correct.

[114]

Q. Is that correct?

A. Yes. Yes, it is.

The Court: 3 through 16 you mean, don't you?

Mr. Kelly: Well, these original records.

The Court: All right.

Mr. Kelly: I offer Plaintiff's Exhibit 17 in evidence.

Mr. Lumley: Same objection.

The Court: The same ruling by the Court. The objection is denied, and the exhibit may be admitted for what it is, a summary, here.

(60) Mr. Kelly: I would like to read into the record from Exhibit 17, if the Court please, the following:

> "Total number of cases covering the period July 1, 1953, through the year 1960: 482. Total number of these cases, of the 482 cases, handled by the Henslee firm: 218."

Mr. Lumley: I submit, if the Court please, if Mr. Kelly is going to read that summary into the record, he should read it all, because it shows a certain pattern that is going down rather than up.

Mr. Kelly: Well—

Mr. Lumley: Well, look at it for yourself.

Mr. Kelly: I do not agree with counsel. The whole exhibit is in evidence and I prefer to refer to things that are pertinent to the Court.

The Court: Whatever portion of it is not read into the record by Mr. Kelly, it may be read in by you, Mr. Lumley.

Mr. Kelly: Of the total of 482 such cases covering the period referred to, 218 were handled by the Henslee firm. The total amount of settlements in those 480 cases was $5,357,480, of which the Henslee firm handled cases in which the payments totaled $2,352,469.

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Q. (By Mr. Kelly): As I have examined the exhibits with the periodic schedules here, Mr. Walsh, not all of these cases have the settlement amounts paid included. Is that correct?

A. That's correct.

(61) Because they were not available?

A. That's right.

Q. So that this figure of total payments appearing on Plaintiff's Exhibit 17 is the total of the payments for the cases in which you have that total, have you?

A. Yes, that's right.

Q. But there are a number of cases in these exhibits as to which you have no amounts?

A. That's correct.

Q. Now, have you prepared from your records a list of F. E. L. A. cases involving Michigan residents pending with the Attorneys Henslee & Henslee, Chicago, Illinois, reported to the claims research bureau as of June 23, 1961?

A. Yes, I have.

Mr. Kelly: Will you mark this, please?

(The paper referred to was marked "Plaintiff's Exhibit 18.")

Q. (By Mr. Kelly): Showing you Plaintiff's Exhibit 18, I will ask you whether that is such a list.

A. Yes, it is.

Q. Prepared by you?

A. Yes, it was.

Mr. Kelly: Exhibit 18 is offered in evidence.

Mr. Lumley: May I ask a question on this proposed Exhibit 18?

(62) The Court: Go ahead.

Q. (By Mr. Lumley): Mr. Walsh, where did you get the information that you have placed upon the proposed Exhibit 18?

[116]

A. From our files in Chicago.

Q. From your files?

A. Yes.

Q. Through what source did the information reach your files?

A. From the various railroads involved.

Q. You never checked any of the court records?

A. No.

Q. There are court records in all of these pending cases?

A. Well, I don't know. They are all suits.

Q. You don't even know if they are suits?

A. No, I don't. They may be claims, in which case no suit has been filed.

Q. At least, you haven't checked the records of the court and you haven't checked the records of the companies that gave you the information?

A. No, we haven't.

Mr. Lumley: I object to it, your Honor, on the grounds, one, that it isn't the best evidence of what it contains.

It is highly self-serving. We don't even have the benefit of their records, because that is not a record that is kept in the ordinary course of business and it has not been (63) established; and, secondly, I object to it because it carries on the period that follows the date of the institution of this suit and it is therefore inadmissible because it is not in support of the issues that are involved herein.

But, most important, it definitely is not the best evidence, and we do not have sufficient information, nor does Mr. Walsh have sufficient information.

Mr. Kelly: The same objection was made earlier this morning, that we didn't have personal information. That [117]
is not an objection as to the admissibility. It may go to the weight of it under the statute.

Mr. Lumley: Those aren't the records, Mr. Kelly.

Q. (By the Court): That is a summary prepared from the cards, is it not?

A. Yes, yes.

Mr. Lumley: Where are the cards?

Q. (By Mr. Kelly): Do you have the cards here?

A. No, the cards are in our files in Chicago.

Q. You can produce those cards if counsel wants to see them?

A. Yes, I can.

Mr. Lumley: The cards or their records.

Mr. Kelly: What?

Mr. Lumley: The cards or their original records.

Q. (By Mr. Kelly): Will you produce them for Mr. Lumley if he wants to examine them?

(64) A. Yes, I will.

Mr. Kelly: We will make that offer, your Honor, in good faith, to have them available for Mr. Lumley within the next day or two as a condition for admitting the exhibit if the Court wants to admit it.

Mr. Lumley: I don't think that should be a condition.

Mr. Kelly: I think it is properly admissible on that understanding, your Honor please.

Mr. Lumley: They are able to bring all the other cards here, your Honor. There is no reason why those cards should not have been brought.

Mr. Kelly: I will take the blame for it. I didn't ask him to bring them, but I will ask him.

Mr. Lumley: You asked him to bring the summary.

Mr. Kelly: I will ask him to bring the cards covering these twenty-six cases if you want to stand on the objection, Mr. Lumley.

[118]

Mr. Lumley: No, you are placing me in a position that is embarrassing. I don't want, however, to be placed in that position.

I object to the introduction of that exhibit because it is not the best evidence of even the records of the company that he represents.

Mr. Kelly: Well, I think they might be admissible (65) even without them, your Honor please, but my associate, Mr. Hall, suggests that we waive the introduction of the exhibit; and that is all.

The Court: Do you want to withdraw Exhibit 18?

Mr. Kelly: Yes.

The Court: Very well.

Mr. Kelly: You may cross-examine.

Cross Examination

By Mr. Lumley:

Q. Mr. Walsh, what is your position with the Association of American Railroads?

A. I am supervisor of the clearing house.

Q. Who is your immediate superior?

A. Mr. K. A. Carney.

Q. What is the function of your particular department?

A. We accumulate statistics with respect to employee injury claims.

Q. What is the purpose of accumulating those statistics?

A. We can make analyses such as we have seen here in these exhibits. We can also study the costs of the various types of injuries and so forth.

Q. Do you have any other purposes?

A. Yes, there are other purposes, too.

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Q. Is one of your purposes the investigation of lawyers handling those claims?

A. I wouldn't say lawyers actually.

(66) Q. Well then, let's carry it a step further. Is one of your functions to investigate the individuals who are in any way associated with the presentation of those claims?

A. I would say yes to that.

Q. Isn't it a fact that you have made it your business to cooperate with the various bar associations throughout the country in connection with railroad claims?

A. Yes.

Q. Isn't it a fact that you are under the employ of the various railroads?

A. Yes, we are.

Q. Each railroad contributes so much money to your department?

A. That's true.

Q. And the purpose of your particular research division is not to analyze various claims so much as it is the studied attempt on the part of your department to investigate these claims, investigate the individuals who make the claim, investigate the parties who represent them in making their claims? Isn't that true?

A. No, I can't say as to that.

Q. When did you first cooperate with the State Bar of Michigan in connection with the pending litigation?

A. I believe Mr. Kelly brought that up this morning. It dates back some years.

Q. I didn't ask you what Mr. Kelly brought up this morning. I (67) ask you to answer my question, please.

A. I don't have the exact date at my fingertips.

Q. Well, can you give us an approximation of that date?

A. I believe it was in 1953 if I am not mistaken.

[120]

Q. Yes. And you have been the chief investigating department for the State Bar of Michigan since that time, haven't you?

A. I believe we have, yes.

Q. Yes. And you have compiled this data specifically for the railroad purposes, haven't you, in handling claims?

A. I don't know. I don't make the policy there.

Q. What?

A. I don't make the policy as to that.

Q. You say your immediate superior is Mr. Carney?

A. Yes.

Q. Isn't it a fact that Mr. Carney has testified at various hearings throughout the country?

A. Yes, he has.

Q. Now, the American Association of Railroads perform a good many functions in addition to the one that is handled by your department, isn't that true?

A. Yes, that's true.

Q. They are also lobbyists for the railroads, aren't they?

A. Yes, they are.

Q. And they are paid a very sizeable sum of money each year by the railroads to carry on their functions, aren't they?

(68) A. Yes.

Mr. Kelly: No one objected to any of this, if the Court please, but I think it is getting in the argumentative field and entirely incompetent on the inquiry here.

Mr. Lumley: It goes to the question of the credibility of this witness.

Mr. Kelly: I think if you ask the witness himself what he has done.

Mr. Lumley: He is working for a principal.

Mr. Kelly: I think that is—

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Mr. Lumley: I am laying the foundation about these records.

Mr. Kelly: I don't care to object. I just thought there was a time when it should end.

The Court: All right, let's go here.

What was the last question, Mr. Reporter?

(The last question and answer were read.)

Q. (By Mr. Lumley): Now, isn't it a fact that those so-called cards that you have in your possession and which have been introduced in evidence in this case and which are lying on the desk up there, Exhibits 3, 5, 7, 9, 11, 13, and 15, are called A-3 cards?

A. Yes, they are.

Q. Isn't it a fact that those cards are used as the vehicle to investigate the solicitations of cases?

(69) A. Yes, they are.

Q. So that, in fact, as far as your particular department is concerned, you are a sort of detective body designed to investigate cases after they have been settled. Isn't that true?

A. Yes.

Q. You don't do any investigative work before the cases are settled or presented to court, do you?

A. Not as a general rule, no.

Q. As a general rule, you do that after they have been settled?

A. That's true.

Q. You investigate the lawyer, don't you?

A. I couldn't say.

Q. How he got the case?

A. Yes; in that respect, yes.

Q. You investigate the individual to see if his injuries are as permanent as he claimed they were in court?

[122]

A. Yes.

Q. You do this not for the State Bar, do you? You do this for the railroads?

A. Yes.

Q. Isn't it axiomatic with the railroads that they haven't been in sympathy with the F. E. L. A. Law ever since it has been enacted?

A. I am sorry, I can't say anything about that.

Mr. Kelly: I object to it.

(70) The Court: I think that is going a little far afield here.

Q. (By Mr. Lumley): I am going to read to you some testimony of a certain individual that you have indicated as Mr. Carney and ask you if that is your conception—

I haven't completed my question.

Mr. Kelly: I understand it.

Q. (By Mr. Lumley, continuing):—and ask you if that is your conception of the functions of the department you represent.

Mr. Kelly: I object to counsel presenting this witness the testimony of someone else, not himself, and asking him to judge it for this Court.

It is clearly incompetent, irrelevant, and immaterial.

Mr. Lumley: I am asking him not to judge the testimony.

I am asking to see if this is a fair statement of the purposes of his particular department in connection with this work.

Mr. Kelly: That is even more incompetent and immaterial.

Mr. Lumley: I am not asking him to pass upon the testimony. I am taking the testimony of his superior and asking him if that is correct.

[123]

The Court: You are asking to pass upon the testimony, coming in through the back door, and I do not think (71) that is proper.

Mr. Kelly: Yes.

Mr. Lumley: I am asking him, if I may state it, your Honor: Is this information correct?

The Court: Put the question to him that way. Don't put it to him as Mr. Carney's question.

I do not care what Mr. Carney said.

Q. (By Mr. Lumley): Now, isn't it the primary function—

Mr. Kelly: Just a minute. Have we left that question?

Mr. Lumley: No, sir. I have left the question, yes, in deference to his Honor's opinion.

The Court: I told you—

Mr. Kelly: (interrupting): All right.

Mr. Lumley: I accepted the hint the Court gave me.

Mr. Kelly: That is nice of you.

Q. (By Mr. Lumley): Isn't it the primary function of your particular department to interview the railroad employee cases which have been disposed of through settlement or otherwise and to determine from them a number of things, one of which, and perhaps the most

important of which, is what pressures were applied upon the individual to employ any counsel; secondly, to determine the identity of the persons providing that pressure—

Mr. Kelly (interrupting): Well, number one—

(72) Q. (By Mr. Lumley, continuing):—thirdly—

Mr. Kelly: Just a minute.

Mr. Lumley: I have to complete the question.

Mr. Kelly: No. You are asking two or three questions at once which is objectionable; and it is also objectionable for counsel to repeat what he has already covered

[124]

in his cross-examination. And he has already asked this witness whether his department of the Association of American Railroads investigates these cases after they have been completed, and now he is asking the same question over again in just a different way and I object to it.

I think the record should not be so extended, and I do not think it is competent.

The Court: How many subdivisions are you going to add onto this question?

Mr. Lumley: There are only three subdivisions, your Honor, and that covers what we claim are the functions.

The Court: Finish the question. Go ahead.

Mr. Lumley: Now will you read that question, Mr. Reporter?

The Court: Start with the second one and I think we will have it.

Mr. Lumley: The second one, yes.

(The reporter read as follows): "Secondly, to determine the identity of the persons (73) providing that pressure—"

Q. (By Mr. Lumley, continuing):—thirdly, to determine his then-physical condition to determine whether or not he was the totally disabled person that he reported himself to be at the time his suit was tried or his case was disposed of?

Is that what your function is?

Mr. Kelly: That is the same question already been asked and answered. I think there should be a limit.

The Court (to the witness): Answer the question.

A. I would say yes.

Q. (By Mr. Lumley): And isn't it an additional function that you determine from the particular claimant anything else of importance that might be of interest to the individual railroads as to medical treatment he got or the disposition of his claim?

[125]

A. Yes.

Q. Now, who contacted the bar association first? Did the State Bar Association of Michigan contact your department or did you contact them?

A. I can't answer. I wasn't aware of the negotiations and progress.

Q. Were you subpoenaed to come here today?

A. No, I wasn't.

Q. You came of your own free will?

A. Yes, I did.

(74) Q. Where is your main place of operation where you operate—

A. Chicago.

Q. (Continuing): on behalf of the company?

A. In Chicago.

Q. So you came all the way from Chicago to testify in these proceedings without any more than a request?

A. That's correct.

Q. Were you paid costs to come here?

A. No, I wasn't.

Q. Were you promised any costs or fees of any kind to come here?

A. No, I wasn't.

Q. You came here, then, at the expense of your company, is that right?

A. Yes.

Q. Now, these cards which have been referred to in the record, these A-3 cards,—and I don't want to repeat all the exhibits for the record; I think they are all understood now—I am going to let you hold these cards in your hand temporarily and ask: What records do you have in your department besides these particular cards?

A. Well, we have all types of records.

Q. Let us know what kind of records you have.

[126]

A. Well, we have correspondence among other things.

Q. With whom?

A. Well, we have day-to-day correspondence, of course.

(75) Q. Do you have any other records in any particular file as to each claim?

A. Not as to each claim, no.

Q. Do you have letters from the various railroads that employ you?

A. Yes, we do.

Q. Is that where you get your information that you put on those A-3 cards?

A. No, we don't.

Q. You do not investigate each claim yourself, do you?

A. No, we don't.

Q. You don't go to the court to find out if it resulted in a judgment or it was a settlement?

A. No, we don't.

Q. You don't know whether, as far as you are concerned—you don't know for sure whether the attorney represented the party in court, do you?

A. That's correct.

Q. As far as you know, you don't know whether the attorney presented the claim.

A. That's right.

Q. That's right. I notice that in plaintiff's Exhibit 16 the firm of Kelly, Kelly & Kelly is listed. Is that correct?

A. Yes, they are; yes.

Q. Did you investigate the firm of Kelly, Kelly & Kelly to find (76) out how they happened to get that claim?

A. That I don't know.

[127]

Q. No. Now I am going to show you plaintiff's Exhibit 8 and ask you if you do not notice in the Michigan cases there the name of A. C. Lumley.

A. Yes, I do.

Q. Did you investigate me to find out if I ever represented that claim or was attorney of record in any description?

A. I don't know.

Q. No, you don't.

A. No.

Q. What if I were to tell you that I did not appear in that claim at all and never had my name affiliated with it? What would you say?

A. I couldn't say anything.

Q. Now, in all of these particular claims where you dwell on Henslee & Henslee—let's take the exhibit, plaintiff's Exhibit 4. There are quite a few cases in there of L. M. Marko in Detroit, aren't there?

A. Yes, there are.

Q. Do you know who L. M. Marko is?

A. I only know his name.

Q. You only know his name. Where did you get his name?

A. From these cards.

Q. That is all you know about it?

(77) A. That's all I know.

Q. Do you know whether your department, through Mr. Carney or yourself or any other agent, made any investigation of Mr. Marko?

A. I can't answer that. I don't know.

Q. Will you examine those various exhibits which are compilations of the A-3 cards and tell me how many cases are represented by L. M. Marko in Michigan, having to do with F.E.L.A. cases?

[128]

A. I would say approximately sixty-one or sixty-two if I added correctly.

Q. And didn't the fact there were sixty-one cases that were being delivered to L. M. Marko in Detroit indicate to you that maybe it would merit some investigation by your department?

Mr. Kelly: If the Court please, I do not understand that this witness has anything to do with investigation.

He keeps records, number one. As to that, the question is argumentative.

The Court: I do not think the question is properly put.

Mr. Kelly: I object to it.

Q. (By Mr. Lumley): In view of the fact that L. M. Marko had sixty-one cases extending over the period covered by these compiled exhibits, did your company make any investigation to your knowledge of Mr. Marko?

(78) A. I don't know. I can't say.

Q. Isn't it also true, since you made this compilation yourself—isn't it also true—

A. Yes.

Q. (Continuing): that a large number of Chicago firms also handled Michigan cases?

A. Yes, they do.

Q. Now, isn't it further true that the Brotherhood of Railroad Trainmen, that is, the individual claimants, travel between cities and towns both in Illinois to Detroit and back again? Isn't that true?

A. Yes, they do.

Q. So that in many respects they are just as much at home in Chicago, Illinois, as they are in Detroit? Isn't that correct?

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Mr. Kelly: That is argumentative, if the Court please.

The Court: It is not proper. The objection will be sustained.

Q. (By Mr. Lumley): Now, did you have any data as to the number of claimants who contacted the firm of Henslee & Henslee in Chicago on the question of whether or not those claimants operated trains in the Chicago area or worked on trains in the Chicago area?

A. I have no information, no.

Q. How many times have you testified for the various state bars?

(79) A. This is the first occasion.

Q. To your knowledge, how many times has Mr. Carney testified for the state bars?

A. I couldn't say, I have no knowledge.

Q. You have no knowledge at all?

A. Not on my own memory, no.

Q. Have you had operatives in the State of Michigan investigating various Michigan claimants in connection with this suit?

A. Yes, we have.

Q. How long have you had them here?

A. Well, I couldn't say. I don't control their assignment.

Q. Well, you know you have got them here, so can you tell us when they first arrived here or you first started to bring them into Michigan?

A. I believe when our department was organized in 1953. A man came over at that time.

Q. So the information that you have on the A-3 cards, if I may be permitted to summarize it, and the information that you set forth on the various compilations, schedules that were taken from the A-3 cards, is information

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that you received from the various railroad companies in which you made no investigation to check the accuracy of that information.

A. Yes.

Q. Have you got or have you made a compilation of A-3 cards in cases where claims were settled directly without a lawyer?

(80) A. I have never made a compilation, no.

Q. You do have such records, do you not?

A. Yes, we do.

Q. And those records were reported to you by the various railroad companies much in the same manner as the ones involved in this case.

A. Yes.

Q. Could you get those records?

A. Yes.

Q. Mr. Walsh, can you tell us whether the majority of the claims are settled direct without lawyers or not?

Mr. Kelly: How is that competent, your Honor please?

I think it is incompetent, irrelevant, and immaterial and I am going to object to it.

The Court: I do not think so. If he knows, he can tell us.

A. That is the majority, whether the majority are settled with or without counsel.

Q. (By Mr. Lumley): Yes, what is—let me ask it this way and I will withdraw the last question.

Isn't it a fact that the majority of the claims against the railroad are settled directly without attorneys?

A. I don't think that I can answer that. I don't know.

Q. You don't have such records?

A. We have records of direct settlements, yes.

(81) Q. But they haven't been compiled?
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A. No, they haven't

Q. Do they represent, however, a large portion of the railroad claims?

A. I don't know.

Q. Do you keep records of doctors who have testified in those cases?

A. Yes, we do.

Q. Is that done in behalf of the railroads?

A. Yes, it is.

Q. What is the purpose of keeping those records?

A. As you indicated, doctors who testified in certain cases.

Q. Have you filed complaints to medical associations against certain doctors

Mr. Kelly: If the Court please, I think that all of this is highly immaterial.

The Court: I do not see what that has got to do with this.

Mr. Lumley: That is all, your Honor.

Mr. Kelly: Have you got the exhibits there?

Mr. Lumley: No.

Mr. Kelly: You brought them back with you.

Mr. Lumley: Oh.

Re-direct Examination

By Mr. Kelly:

Q. Counsel asked you numerous questions about whether you had (82) investigated this, that, or the other thing, Mr. Walsh.

I understand your duty is not to investigate but keeping records. Is that right?

A. That's correct.

Mr. Kelley: That is all.

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(The witness was excused.)

Mr. Kelly: Will you mark this, please?

(The booklet referred to was marked "Plaintiff's Exhibit 19.")

Mr. Kelly: Defendants' answer appears to make some issue of whether or not this is properly a class action in this court due to the number of individuals which would otherwise be involved, and on discovery of certain information by discovery procedures of this Court we were furnished with plaintiff's Exhibit 19 by the defendants, and it is a directory of the grand lodges and subordinate lodges of the Brotherhood of Railroad Trainmen as of January, 1959, and we would like to offer it in evidence as to that portion which reflects the number of lodges in the State of Michigan just on the point of the propriety of this class action.

Any objection

Mr. Lumley: What exhibit would this be?

The Court: 19.

Mr. Lumley: 19?

I submit, if the Court please, that Exhibit 19 is (8) incompetent, irrelevant, and immaterial for the reason that this is a suit in which they are seeking an injunction; and, certainly, I do not believe that any of the individual lodges or the chairmen of those lodges, if they are not named parties here, can be under the injunctive force of this suit.

The Court: That is not my understanding of the purpose of it.

Mr. Kelly: If it is a class action, it is to enjoin all members, officers, or agents.

Mr. Lumley: That is my objection.

The Court: I think it may be admitted. It will be received.

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Mr. Kelly: For the purposes of the record, referring to Exhibit 19, I would like to state on the record without reading the entire list of lodges that Exhibit 19 discloses there are some thirty-six subordinate lodges of the Brotherhood of Railroad Trainmen in the State of Michigan.

The plaintiff rests, your Honor.

(The plaintiff rested.)

The Court: I think at this time we can all stand a recess.

(A brief recess was taken.)

Mr. Kelly: May Mr. Walsh be excused?

(84) Mr. Lumley: Yes, yes.

The Court: Yes, you may be excused, Mr. Walsh.

Mr. Lumley: I was wondering, your Honor. I did not mean to interrupt.

The Court: Go ahead.

Mr. Lumley: I was wondering if we could have just a little more time. I think it could shorten things considerably.

The Court: All right. How much time do you need?

Mr. Lumley: Oh, ten minutes. I promise you that it might make a big difference.

The Court: All right, you may have the other ten minutes, We will take an additional ten-minute recess.

(A brief recess was taken.)

Mr. Lumley: Your Honor, I want to make a motion at this time for a decree dismissing the bill of complaint filed in this cause.

I would like to preserve the right under the rule to proceed with our defense in the event this motion is denied.

(Mr. Lumley argued the motion in behalf of the defendants.)

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The Court: Do you wish to reply, Mr. Kelly?

Mr. Kelly: Not unless the Court wants to hear me.

(Mr. Kelly argued in opposition to the motion in (85) behalf of the plaintiff.)

The Court: The Court at this time is going to deny the motion, and you can proceed with your proofs.

Mr. Lumley: The defendants rest.

(The defendants rested.)

The Court: Defense rests.

The Court feels that briefs should be filed in this matter.

Now, the usual time period of fifteen days. Mr. Kelly would have fifteen days and Mr. Lumley fifteen days within which to reply, and then Mr. Kelly ten days within which to answer; but, if you gentlemen happen to be pressed for time, I will grant you some additional time.

Mr. Naughton: I think we would like to order the record, your Honor. On that particular circumstance, perhaps there could be some extension of time.

(Colloquy off the record.)

The Court: Upon completion of the record the court reporter, of course, will notify me, and then I will notify counsel and at that time, why, Mr. Kelly will have fifteen days or enough to get your brief in.

Mr. Kelly: Is that three months from now, John?

Fifteen days would be enough for my account.

(86) The Court: All right, let's get it and we will fix the time for filing briefs when the record is completed.

In the meantime this matter will stand continued from day to day.

This court stands recessed.

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THE STATE BAR OF MICHIGAN,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

No. T—640

DECISION

(Filed September 12, 1962)

This is an action based on a bill of complaint filed in behalf of the State Bar of Michigan on January 28, 1959. Answer thereto was filed on behalf of the defendants on June 9, 1959. A reply was filed by plaintiff on June 16, 1959. Suffice it to say that subsequent amended pleadings were withdrawn.

It was agreed between counsel that the record in this case should be transcribed before the filing of briefs. This was completed, and the matter was ready for disposition by this Court approximately May 1, 1962, including a motion to strike a portion of plaintiff's reply brief having to do with decrees entered in similar situations in other jurisdictions.

With reference to the motion to strike, the same is hereby denied, as this Court may consider any authorities it deems applicable.

An examination of the aforesaid pleadings discloses in substance that the practices complained of were in existence up to May 31, 1959. It is the claim of defendants that they have been in compliance with the decree entered in the case of In re Brotherhood of Railroad Trainmen as reported in 150 Northeastern, 2d Series, at page 163, as evidenced by the letter of March 16, 1959, as set

forth in the first affirmative defense, from W. P. Kennedy, President, and directed to all lodges and members and to all legal counsel, Brotherhood of Railroad Trainmen. Because of the indefiniteness and uncertainty there-

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in in relation to the practices complained of, such a defense position is untenable.

In the aforesaid Illinois case, among other rulings and directives, it was held as follows:

> "The objective of the Brotherhood in seeking to secure competent legal representation of its members can be accomplished without lowering the standards of the legal profession. The Brotherhood has a legitimate interest in investigating the circumstances under which one of its members has been injured. That interest antedates the occurrence of any particular injury. We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood.
>
> "The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully."

The problem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved.

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This same matter has been before the courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states, in one form or another, have approved the decisions of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel.

This Court feels that the plaintiff is entitled to relief.

Plaintiff has submitted a proposed decree with which this Court is in accord, with the following exceptions:

1. The word "all" at the end of line 4 of paragraph 6 on page 3 will be deleted.

2. Subparagraph (d) on page 5, the last line thereof, will be rephrased as follows: "the employment of any particular lawyer or group of lawyers by such person."

3. Subparagraph (e) on page 5 is approved but hereby designated as "subparagraph (f)," and in place and stead thereof shall be inserted subparagraph (e), as follows: "(e) Engaging in any activities, conduct, or endeavor condemned by the Supreme Court of Illinois in the opinion above referred to."

I should not close without adding the following:

The first affirmative defense is without merit. See Seifert v. Buhl Optical Company, 276 Michigan, 692, and cases therein cited.

The third affirmative defense is without merit, as is set forth in the Illinois case aforesaid.

Upon the above corrections and additions being made, a decree accordingly will be subscribed and enrolled in this court.

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I believe that I should make the following observation with reference to subparagraph (e), having to do with the decision of the Illinois Supreme Court, and that is that although certain specific activities and conduct as contained in the Illinois decision were not specifically pleaded in the instant suit, nevertheless, by the defendants' answer, they have been indirectly injected into this litigation and should be covered by the Court's order.

As requested by the office of Mr. Arthur G. Lumley, a copy of this opinion is being forwarded to the office of Henslee & Henslee in Chicago, Illinois.

(Signed) John C. Dalton,

John C. Dalton,

Circuit Judge.

Dated: September 12, 1962.

THE STATE BAR OF MICHIGAN,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

No. T—640

DECREE

(September 14, 1962)

At a session of said court, held in the Circuit Courtroom in the County Building, Jackson, Michigan, this 14th day of September, 1962.

Present: Hon. John C. Dalton, Circuit Judge.

This cause having come on to be heard on the bill of complaint filed by plaintiff, the answer of defendants thereto, and the reply of plaintiff to said answer, and the parties being in court by their respective counsel, and proofs having been taken in open court, and thereafter the parties, through their respective counsel, having filed briefs with the court, and the court having examined the pleadings, having duly considered the evidence and the

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briefs of counsel, and being fully advised in the premises, from which it appears to the court that the material facts alleged in the bill of complaint are true, the court therefore finds as follows:

1. The State Bar of Michigan is a public body corporate, charged with the duty to aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession and the public, and in promoting the interests of the legal profession in the State of Michigan.

2. The Brotherhood of Railroad Trainmen is a national railway labor organization, with principal office in Cleveland, Ohio, but having branches, members, officers and agents throughout the United States, including the State of Michigan.

3. The individual defendants, Frank J. Carr and L. M. Hasbrouck, of Jackson, Raymond Fieberkorn and Thomas W. Fletcher, of Detroit, W. C. Coryell, of Okemos, L. E. Singer of Plymouth, E. V. Surdam of Grand Rapids, H. F. McCall of Birmingham, R. J. Jackson, and L. A. Russell, of Durand, A. V. Grandstaff, of Dearborn, W. T. Ellsworth, of Allen Park, R. J. Snow, of Melvindale, and William E. B. Chase, of Livonia, are members, officers and agents of defendant Brotherhood of Railroad Trainmen residing within the State of Michigan, and there are other members, officers and agents of said defendant Brotherhood of Railroad Trainmen, within the State of Michigan, constituting a class so numerous as to make it impracticable to bring them all before the court, as to all of whom there are common questions of law and fact affecting their several rights and against all of whom a common relief is sought.

4. In or about the year 1930, the Brotherhood of Railroad Trainmen organized and established a "Legal Aid

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Department" as a division of said Brotherhood of Railroad Trainmen, the name being changed, on or about January 1, 1959, to "Department of Legal Counsel."

5. Under the Brotherhood's constitution, by-laws and other action approved by its membership, when a member is injured or killed in railroad operations, member representatives of the Brotherhood call upon the injured

member or his bereaved family, and recommend and urge that they consult with, and retain, the Regional Counsel to represent such member or his survivors in the claim for damages resulting from such injury or death.

6. Regional Counsel, referred to above, are attorneys selected by the defendant Brotherhood of Railroad Trainmen, in some seventeen "regions" designated by said defendant, to receive, through the methods and practices aforesaid, Federal Employers Liability Act cases arising in their designated regions.

7. Edward B. Henslee, attorney of Chicago, Illinois, was designated Regional Counsel, his region including all of Michigan, except the Upper Peninsula. Since his death, in 1958, his associates have acted as Regional Counsel, now called "Legal Counsel".

8. Large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen residing in Michigan and whose claims have arisen within the State of Michigan have found their way into the Henslee offices in Chicago, Illinois for upwards of fifteen years preceding the date of this decree, as the result of the above described activities of the Brotherhood of Railroad Trainmen, its members, officers and agents in the State of Michigan.

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9. Such activities, on an organized and systematized basis, interfere with and impede the orderly administration of justice, adversely affect the relationship between the legal profession in the State of Michigan and the public, and cause, and threaten to cause, irreparable damages to property rights of the public and members of the State Bar of Michigan.

10. The methods of operation of the Legal Aid Department of the Brotherhood of Railroad Trainmen, as set forth above, violate the Penal Code of the State of Michigan, particularly Section 410 thereof, being Section 28.642 of Michigan Statutes Annotated, which provides in part as follows:

> "Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or of any division, bureau or committee of such association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor * * *."

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11. The matter in dispute in this case exceeds the sum of one hundred and no/100 ($100.00) dollars.

It is therefore Ordered, Adjudged and Decreed:

That, in the procurement, within the State of Michigan, of the employment of a lawyer to render any legal services, the respondents the Brotherhood of Railroad Train-

men, Frank J. Carr, L. M. Hasbrouck, Raymond Fieberkorn, Thomas W. Fletcher, W. D. Coryell, L. E. Singer, E. V. Surdam, H. F. McCall, R. J. Johnson, L. A. Russell, A. V. Grandstaff, W. T. Ellsworth, R. J. Snow, and William E. B. Chase, and all other members, agents and officers of the Brotherhood of Railroad Trainmen in the State of Michigan, and all persons in any way or in any manner acting by, through and under them or either of them, are hereby jointly and severally permanently enjoined and restrained from, in any way or in any manner:

a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan;

b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;

c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services;

d. Making unsolicited calls upon any person for the purpose of soliciting contracts for the employment of a

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lawyer by such person, or for the purpose of recommending or urging the employment of any particular lawyer or group of lawyers by such person;

e. Engaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in In re Brotherhood of Railroad Trainmen, 150 Northeastern Reporter 2nd, 163.

f. Conspiring with any resident or nonresident lawyer to violate the laws of Michigan concerning the practice of law within the State of Michigan, or the Canons of Legal Ethics imposed by the Supreme Court of Michigan on lawyers licensed to practice law in the State of Michigan.

John C. Dalton,
Circuit Judge.

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CLAIM OF APPEAL BY DEFENDANTS AND PROOF OF SERVICE

(Filed October 2, 1962)

The Brotherhood of Railroad Trainmen, Frank J. Carr, L. M. Hasbrouck, Raymond Fieberkorn, Thomas W. Fletcher, W. C. Coryell, L. E. Singer, E. V. Burdam, H. F. McCall, R. J. Johnson, L. A. Russell, A. V. Grandstaff, W. T. Ellsworth, R. J. Snow, and William E. B. Chase, and all other members, agents and officers of the Brotherhood of Railroad Trainmen in the State of Michigan, defendants and appellants herein, by Walter M. Nelson, their attorney, severally claim an appeal from the Decree dated September 14th, 1962 of Hon. John C. Dalton, Jackson County Circuit Judge, and appellants severally take a general appeal therefrom.

/s/ Walter M. Nelson,
Attorney for Defendants-Appellants,
1138 Dime Building,
Detroit 26, Michigan.

Henslee, Henslee and Naughton,
Of counsel for Defendants-Appellants,
139 No. Clark Street,
Chicago 2, Illinois.

Dated: October 1st, 1962.

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PROOF OF SERVICE

County of Wayne—ss.

Walter M. Nelson, being first duly sworn deposes and says that on October 1st, 1962 he served a true and carbon copy of the attached Claim of Appeal by defendants upon Messrs. Kelly, Kelly and Kelly, attorneys for plaintiff-appellee, 210 W. Franklin Street, Jackson, Michigan, and Mr. J. Cameron Hall, attorney for plaintiff-appellee, 1323 Dime Building, Detroit 26, Michigan, by placing the same in a carefully sealed and sufficiently stamped envelopes legibly addressed to said attorneys at their said addresses and by depositing said envelopes in the United States mail receptacle in the Dime Building in Detroit, Michigan;

And further deponent sayeth not.

/s/ Walter M. Nelson.

Subscribed and sworn to before me this 1st day of October A.D. 1962.

/s/Louise C. Kushigian,
Notary Public, Wayne County, Michigan.
My commission expires Nov. 11th, 1962.

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PLAINTIFF'S EXHIBIT 1

No. 33877

In the

SUPREME COURT OF ILLINOIS

November Term, A.D. 1955.

In the Matter of the Petition of the Brotherhood of Railroad Trainmen; and W. P. Kennedy, President and a member thereof; on behalf of the members, thereof,

Petitioners.

MOTION FOR LEAVE TO FILE PETITION FOR THIS COURT'S DECLARATORY JUDGMENT OR DIRECTIVE ORDER CONCERNING THE PRACTICE OF LAW IN THE RESPECTS SET FORTH IN THE PETITION.

Petitioners, the Brotherhood of Railroad Trainmen (an international railway labor organization) and W. P. Kennedy (its President), invoking this Court's inherent original jurisdiction over the practice of law in Illinois, respectfully move this Court for leave to file the accompanying Petition for this Court's Declaratory Judgment or Directive Order With Respect To the Practice of Law in regard to the matters set forth in the Petition.

Petitioners show in the Suggestions In Support of This Motion that the Petition presents a most important and very urgent operation of the extent to which a railway labor union subject to the Federal Railway Labor Act (U. S. C. A. 45, Secs. 151 to 164) may afford to members the services of lawyers selected by the Brotherhood in claims against railroad employers, principally but not exclusively arising out of personal injuries and deaths occurring in railroad operations, may urge such members to avail themselves of the services of such lawyers, may compensate member representatives of the Brotherhood for service and to reimburse them for expenses incurred in recommending such attorneys, accompanying injured members or the surviving family of deceased members to such attorneys and investigating such claims.

Respectfully submitted,

Brotherhood of Railroad Trainmen
(a national railway labor union),

W. P. Kennedy,
President of the Brotherhood

By William C. Wines,
Attorney for Petitioners.

SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION

Substance of the Averments of the Petition Sought to Be Filed

The Brotherhood of Railroad Trainmen is the Largest Railway Labor Union and One of the Oldest Labor Unions in the World. It is Older than either the American

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Federation of Labor or the Congress of International Organizations. Petitioner Kennedy is its President.

Petitioner is the authorized bargaining representative for its members under contracts with very nearly all of the nation's railroads. These contracts are subject to the provisions of the National Railway Labor Act (U.S. C. A. 45, Secs. 151 to 164), which Act authorizes the Brotherhood to represent its members in claims and grievances against their employers, arising out of railroad operations.

The Brotherhood's Legal Aid Department

Railroading is one of the most hazardous occupations in the world. It is more hazardous than mining. The work of railroad trainmen comprises in general the most hazardous phase of railroading. For many years prior to 1929, it was the fact (and despite the efforts of the Brotherhood, it is still true) that in many thousands of instances when trainmen were seriously injured or killed in railroad operations, claim agents for the railroads effected small and wholly inadequate settlements with such

injured trainmen or the personal representatives of deceased trainmen. This they were able to do because such injured trainmen or representatives of the deceased trainmen were themselves unversed in the law and had no competent legal advice. Moreover, it was the practice of many railroads to discharge injured employees unless they settled their claims for injuries without suit or before making claims entirely.

On the other hand, it was true before the formation of the Brotherhood, has been true ever since and is still true that many lawyers frequently abuse the confidence of their clients by:
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(1) Effecting low settlements in the case in order to obtain a higher settlement in some other case against the same railroad,

(2) Incompetently preparing and processing such cases upon the law or the facts,

(3) Not fully and fairly explaining to the client the terms of the employment, so that the client, after having assented to settlement, finds the proceeds thereof surcharged with items for expenses of litigation, medical expense, expenses of one sort and another or the like, which are not legitimate, or if legimate, were not explained to him before the settlement was concluded, as well as in other ways.

The objects of the Brotherhood are the amelioration of the condition of railroad trainmen in matters of compensation, hours, seniority, pension, tenure, working conditions and safety. It is to the interest of the Brotherhood and its members that adequate compensation be recovered for every injury resulting from violation of a safety appliance measure, or from other instances of neg-

ligence, *not only for the sake of the injured member or the survivors of a deceased member, but because the exaction of such adequate compensation from the railroad is a strong deterrent to these violations of safety appliance measures and unsafe practices that take such a heavy toll of health, well-being and life. The exaction of adequate compensation for each injury or death due to unsafe railroad practices is to be advantage of every member of the Brotherhood, whether or not he himself is ever injured or killed.*

Such adequate compensation cannot in general be exacted if members of the Brotherhood are persuaded by

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claim agents either to settle their own claims or to place them in the hands of incompetent, inexperienced, or otherwise inadequate counsel.

In 1930, A. F. Whitney, then President of the Brotherhood, in a public utterance to the Brotherhood's membership, declared that in his "several years' experience as an officer of the Brotherhood," it had come to his attention that "members of the organization and the dependents of members who had been killed while engaged in railroad service" had "fared rather badly at the hands of railroad claim agents in some instances, as well as at the hands of so-called ambulance-chasing lawyers" and that "settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers had been made with members of the Brotherhood who were either entirely devoid of their rights in such matters or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements. He therefore urged the establishment of a "Legal Aid Department" for the Brotherhood.

In accordance with the constitution, by-laws and other action of the Brotherhood and its membership, there are at present 15 Regional Counsel for the Brotherhood, each such Counsel representing the Brotherhood and its members with respect to the territory assigned to him.

Edward B. Henslee, a Chicago lawyer, is General Counsel for the Brotherhood and is one of the 15 Regional Counsel. He has offices in Chicago.

Regional Counsel, including Henslee and his associates in his practice, represent the Brotherhood and its members in labor relations with the railroads by whom the Brotherhood's members are employed.

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Such representation includes, *inter alia,* the rendering of legal assistance in the matter of negotiating and enforcing collective bargaining agreements between the Brotherhood and its members, on the one part, and the employing railroad or railroads, on the other part, the advising of the Brotherhood and its members as to the scope, intent and effect of contracts in effect or proposed, the processing of grievances on behalf of individual members or groups of members by negotiation, arbitration or in proceedings under the Railway Labor Board under the Railway Labor Act (45 U. S. C. A., Sections 151-188, incl.), and the like. More particularly, Regional Counsel in general and Edward B. Henslee and his associates in particular, advise upon, process, negotiate, and where necessary litigate claims with respect to rates of pay, overtime pay, seniority, working conditions and safety matters.

Under the Brotherhood's constitution, by-laws and other action approved by its membership, when a member is injured or killed in railroad operations, it is not only the right and privilege but the duty and obligation of mem-

ber representatives of the Brotherhood, usually the Chairman of the Grievance Committee in the local of the accident, to call upon the injured member or his bereaved family, and not only explain to them that they can but recommend and urge that they do consult with the Regional Counsel and his associates. The representative informs them that (as is the fact) such consultation does not require them to retain Regional Counsel and will entail no financial obligation upon them unless they do retain such Counsel. There is no disavowal, however, of the fact that representatives do in fact not only urge members or survivors of the deceased members not only to consult, but to retain, Regional Counsel. Members are told

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that (as is the fact) Regional Counsel are not permitted to and will not charge in excess of 25% of the amount of any recovery, whether recovery be effected by suit or settlement, and that this percentage will include expenses incidental to the investigation and any litigation of the claim.

Local Chairmen, or other member representatives of the Union, are reimbursed for their time in bringing injured members or the survivors of deceased members to the offices of Regional Counsel. In many instances member representatives of the union are employed to investigate claims, it having been found that their acquaintance with fellow-employee witnesses and their conversance with railroad operations make them, for many cases, the best investigator. Reimbursement is at the member representative's hourly rate of pay on the railroad, is made immediately, and is wholly independent of whether any money is recovered upon the claim or not. Member representa-

tives are also reimbursed for any out-of-pocket expenses incurred in bringing injured members or the survivors of deceased members to Regional Counsel and in investigating the case. Such reimbursement is likewise independent of the result of any claim.

Charges Before the Chicago Bar Association Precipitating This Petition and Motion

The Committee on Inquiry of The Chicago Bar Association has preferred a complaint against Edward B. Henslee and three of his associates (Edward B. Henslee, Jr., Walter N. Murray, and Frank H. Monek) charging these lawyers with the unprofessional solicitation of personal injury and death cases arising out of railroad operations. [153]

To be sure, the complaint does charge acts which, if the acts were in fact committed, would raise questions other than the single question sought to be presented by the accompanying Petition. They charge, for instance, that Henslee and his associates divide fees with laymen and that Henslee and his associates employ "runners" or "touters." These charges have been, however, categorically denied by the answer of Henslee and his associates. Petitioners do not ask any determination of the questions of fact propounded by the charges mentioned in this paragraph and the denials thereof. They must try these charges before the Committee if the charges are persisted in.

What Petitioners do seek, however, is this Court's declaratory Judgment or Directive Order, directed to the members of the Grievance Committee and Board of Managers of The Chicago Bar Association as this Court's Commissioners under Rule 58, as to whether the candidly admitted

facts above summarized transgress any canon of ethics in the light of the considerations submitted in these Suggestions.

I.

This Court has inherent jurisdiction to enter a Declaratory Judgment or a Directive Order to its Commissioners under this Court's Rule 58 in the matter of the question presented by this Petition.

Of course, this Court has jurisdiction of and superintendence over the practice of law, whether by licensed lawyers or unlicensed practitioners. *In re Day,* 181 Ill. 73. It has frequently exercised this jurisdiction not only on reports transmitted to it under Rule 58, but in original proceedings filed by The Chicago Bar Association. *People* v. *People's Bank,* 344 Ill. 462.

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If it be said that the adjudication sought in this case is an "advisory opinion" beyond the jurisdiction of this Court, the answer is simple and brief:

There is now pending before this Court's Commissioners a proceeding which, upon the pleadings, has propounded a question of law. This Court has the same inherent authority to define issues of *fact* by ruling upon questions of *law* that any Court has in framing the issues of fact to be determined by a Master, Special Commissioner, Referee, or other inquiry judicial or quasi-judicial officer or tribunal.

Moreover, the provisions of the Civil Practice Act have recently been held to be available, where the ends of justice require, even in original proceedings in this Court. And the Declaratory Judgment Act is, in virtual substance, a provision of the Civil Practice Act.

We cannot imagine that The Chicago Bar Association, its Board of Managers and its Grievance Committees who are this Court's Commissioners under Rule 58, would challenge this Court's jurisdiction to instruct them as to the proper scope of their inquiries. If such challenge should be forthcoming the considerations developed above are the answer thereto.

II.

No contested Question of Facts is tendered by the Petition sought to be filed.

It may be suggested that the Petition sought to be filed tenders issues of fact upon its face, or it may be suggested that an answer denying the allegations in the Petition sought to be filed will form such issues. And this Court's inexorable rule that it will not, in the first instance, try

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issues of fact in an original proceedings even though it has jurisdiction to try such facts may be invoked to prevent entertainment of the tendered Petition at this time.

If such a suggestion is made, the answer is as follows:

Petitioners recognize that insofar as their Regional Counsel are charged with acts other than or different from those described in the tendered Petition, orderly procedure requires a trial of the issues joined by denial of those charges before this Court's Commissioners and not before this Court. Indeed, as a practical matter, this Court could do little else than refer such issues of fact back to its Commissioners.

But there is no denial that Petitioners' Regional Counsel in fact do all of the things described in this Petition. Counsel for the complainant before a Grievance Com-

mittee has declined either to reply to or move to strike Petitioners' Counsel's answer to the charges, which frankly admits the conduct described in the tendered Petition. Petitioners and their counsel at the present time, therefore, have no means of finding out, save by this Court's adjudication, whether their counsel's *admitted* conduct does or does not transgress the canons of professional ethics. An adjudication that Petitioners' counsel's *admitted* acts do or do not transgress the canons of professional ethics will greatly narrow the issues to be tried.

Petitioners' counsel are perfectly willing to go to trial on questions of fact as to whether they split fees, whether those counsel employed 'touters" and "runners" or as to whether those counsel have committed acts other than those they frankly admit. They do not, however, wish to

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go to trial on the question as to whether member representatives of the Brotherhood who are not employed by Petitioner's counsel are Petitioners' counsel's agents; for that question is one of pure law.

III.

Failure to entertain this Petition at this time will seriously prejudice the Brotherhood, its members, and its Regional Counsel and will entail wholly unnecessary expenses of time, energy and money, not only upon petitioners and their counsel, but upon injured members, their families counsel for complainant, and the unpaid Commissioners of this Court.

The single question tendered by the Petition sought to be filed is a simple one.

A direct ruling that Petitioners' *admitted* conduct is or is not proper will greatly simplify for all concerned the proceedings before this Court's Commissioners.

If it is the purpose of the complainant's counsel and the Commissioners to bring dozens, scores, or hundreds of Petitioners' counsel's former clients before the Commissioners merely to elicit the *admitted* fact that they were prevailed upon to use Petitioners' counsel by the urgings of member representatives of the Brotherhood and that such member representatives were compensated for their time and effort, and were reimbursed for their expenses in the matter of prevailing upon such injured members or survivors of deceased members to retain Petitioners' counsel, no useful purpose whatever will be served. Several years of the time of the Commissioners and counsel for the complainant (all of whom are unpaid) will be consumed. The time and energy of Peti-

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tioners' counsel will be consumed. Injured persons will be forced to give depositions or come to Chicago.

As we have said, with respect to any charges of matters other than those admitted, Petitioners' counsel must perforce go to trial upon questions of fact raised by their denials of such charges.

IV.

The Authorities sustain Petitioners' contention that Railroad Labor Unions may provide counsel for their members in grievances, including personal injury and death claims arising out of railroading, may urge members to retain such counsel, and may compensate member representatives for their services in effecting liaison between injured members or the survivors of deceased members and such counsel.

In *Ryan* v. *Pennsylvania Railroad*, 268 Ill. App. 364, an injured railroad man had settled directly with the railroad after statutory notice of attorney's lien had been served by the then Regional Counsel for the Brotherhood. The injured plaintiff had been prevailed upon to retain Regional Counsel *by the very means described in the tendered Petition*! The railroad company contended that the contract of retainer was obtained by unprofessional means and was, therefore, void. The Court, rejecting this contention, declared that it was "unworthy of the able lawyers who made it."

The National Railway Labor Act (45 U. S. C. A., Sections 151-164) authorizes railroad unions or Brotherhoods to represent their members in grievances with the employing railroads. A railroad man who has lost both legs certainly has a "grievance" against the railroad. This is

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true, of course, whether it is ultimately determined that the loss of legs is, or is not, actionable under the Federal Employers' Liability Act, the Safety Appliance Act, or other cognate Federal statutes.

The Brotherhood has no means of vindicating its members' claims for such "grievances" except in the Courts. (It should be noted that the Pennsylvania Railroad is presently denying the right of Brotherhoods to call strike with respect to past "grievances" of individual members.)

If the Brotherhood undertakes to represent its members in Illinois courts without lawyers it will be accused —and guilty—of unlicensed and unauthorized practice of law.

The Chairman of the Standing Committee on Professional Ethics and Grievances, American Bar Association, Henry S. Drinker, Esquire, in his recent work, Legal Ethics, published in the Legal Studies of the William Nelson Cromwell Foundation and printed by Columbia University Press, New York, in 1953, says, on page 167:

> "It is not believed that the Canon will prevent the labor unions from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public."

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This Court is fully cognizant of the realities, actualities and the pragmatic exigencies of personal injury law in Illinois, and particularly in Chicago. Cases in which hideously injured railroad men or their survivors have been prevailed upon to settle for pittance, are a matter of com-

mon knowledge. See, for a particularly shocking example of this practice, the decision of the U.S. Court of Appeals for this Circuit, in *Marshall* v. *New York Central Railroad Company*, 218 F. (2) 900, in which case, according to evidence uncontradicted by the defendant on Motion for Directed Verdict, the almost illiterate widow of a section-hand was induced to take $4000.00 "in full settlement" of a claim for the death of her husband and breadwinner when an admittedly defective wheel caused the derailment of a car, admittedly equipped with hand-rails sufficient to protect only five of its 21 passengers. (This is not a case in which Regional Counsel were employed.)

Cases in Chicago pend from four to five years before coming to trial and, if appealed, pend for from one to two years in the Appellate Court and this Court. During this time, men without legs, without arms, without eyes, or with broken backs or broken necks must live. If their own unions cannot provide a means of financing them while they lie in hospital beds or sit in wheel-chairs as the years roll by, a potent weapon indeed has been put into the hands of the railroad claim agent: the threat of starvation for the injured, the dying and their families.

There are, however, even more compelling reasons so far as legal ethics is concerned why the Brotherhood is eminently justified in advising its members to retain Regional Counsel.

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In the first place, all of the members of the Brotherhood (and the Brotherhood is the Federal stautory representative of its members) have a definite economic and, therefore, legally cognizable interest in every claim for personal injuries. Recoveries, or failure of recoveries, set precedents. This is true whether such recoveries are re-

viewed by the higher Courts, result from lower Court verdicts, or are effected by settlements out of Court; for lower Court verdicts and settlements, as well as higher Court opinions, set patterns in the field of railroad injury litigation as they do in every other field.

The canonical inhibitions against "champerty" are directed against those who have no interest in a possible lawsuit except such interest as they generate for themselves by intruding themselves into it. But members of labor unions, like members of trade associations and other groups, have a wholly legitimate interest in such litigation as will affect not only the parties involved, but the entire trade or industry. No one would gainsay, for example, the right of a title insurance company to finance litigation on the part of one who was not even insured by the company if this Court's opinion would determine liability by title guarantors in hundreds of future cases.

Finally, it is a self-evident fact—and we are certain that the Honorable members of The Chicago Bar Association's Board of Managers and Grievance Committee will not deny the fact—that lawyers who do not represent Brotherhoods frequently do not realize the importance of obtaining not only a monetary recovery but continued tenure for a man with many years of seniority and accrued pension rights. A railroad will pay, let us say, $10,000.00 in settlement of a claim if the man will agree to cease railroading whereas it will pay much less than that amount if it must continue to employ him.

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Petitioners represent to this Court that counsel selected by Petitioners see to it that Regional Counsel pay as much attention to seniority and accrued pension rights

as to net amount of recovery. If they do not they will not hold their posts as Regional Counsel.

V.

This case is of such National importance as to merit this Court's discretionary entertainment of the tendered Petition at this time.

The question presented by this case is one of great importance to all railroad men, to all organized labor and, therefore, to all the employers of such labor.

It should elicit this Court's decision at the earliest possible moment.

We therefore most respectfully, but very earnestly, seek this Court's prompt entertainment and disposition of the question proffered by the Petition accompanying this Motion.

Respectfully submitted,

Brotherhood of Railroad Trainmen
(a national railway labor union),

W. P. Kennedy,
President of the Brotherhood

By William C. Wines,
Attorney for Petitioners.

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PLAINTIFF'S EXHIBIT 2

No. 33877

In the

SUPREME COURT OF ILLINOIS

November Term, A.D. 1955.

In the Matter of the Petition of the Brotherhood of Railroad Trainmen; and W. P. Kennedy, President and a member thereof; on behalf of the members, thereof,

Petitioners.

PETITION FOR THIS COURT'S DIRECTIONS WITH RESPECT TO THE REPRESENTATION BY ATTORNEYS OF MEMBERS OF THE BROTHERHOOD OF RAILROAD TRAINMEN AND THE SURVIVORS OF DECEASED MEMBERS IN MATTERS ARISING UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT AND THE RAILWAY LABOR ACT.

Petitioners, Brotherhood of Railroad Trainmen, and W. P. Kennedy, President and a member thereof, by William C. Wines, their counsel on due notice to the Chicago Bar Association, its Board of Managers and the members of its Grievance Committee, for this their Petition for instructions in respect to the matters hereafter set forth respectfully show unto the Court that:

1. As more fully hereafter appears, this Petition invokes this Court's original and inherent jurisdiction and power of superintendence over the practice of law in the [163]

Courts of Illinois. That jurisdiction and power may be exercised summarily or otherwise and by all such judgments, orders, writs, rulings, or process as may be appropriate.

2. As more fully appears hereafter, this Petition presents a most important and urgent question, emerging from the facts hereafter narrated and precipitated by the certain proceedings before the Grievance Committee of the Chicago Bar Association hereafter mentioned, in the field of the ethics of lawyers in their relation with bona fide labor organizations in general and in particular with labor organizations whose relations with railroad employers are subject to the Federal Railway Labor Act (45 U. S. C. A., Sec. 151-164). That question is fairly delineated as follows:

> A. A Railroad Brotherhood, organized for the General purpose of ameliorating railroad trainmen's working conditions, including compensation, hours, seniority, pension, security, working conditions generally, and with respect to matters of health, bodily welfare and safety in railroad operations, has since 1930 maintained a legal aid department. This department is staffed by members of the Bar of Illinois and other states. The Brotherhood encourages, without requiring, its members to repair to that department for legal advice and representation in railroad injury and death cases. The Brotherhood requires various local representatives to call upon injured members or the survivors of members killed in rail-

road accidents and to inform the injured members or the survivors of members, of the services available from the department. Such representatives advise injured members and survivors of deceased members to avail themselves of the services of the department. The department compensates its member representatives for their time and effort only in the matter of bringing injured employees or survivors of deceased members to the office of the legal aid department and for services of investigating the accident from which claims have arisen. The compensation is no wise contingent upon recovery on any such claim. Does the operation of the Brotherhood's legal aid department under such auspices violate any canon or principle of professional ethics?

3. The petition presents the related question:

A. Does the Railway Labor Act (45 U. S. C. A., Secs. 151-188) which authorizes the Brotherhood to represent its members in the matter of "Grievances" against carriers, by fair implication and intent authorize the Brotherhood to represent such members in personal injury and death cases arising from accidents in interstate commerce notwithstanding any rule or doctrine of state law which may exist?

The Organization and Character of the Brotherhood of Railway Trainmen.

4. The Brotherhood of Railroad Trainmen is a railway labor organization bound in its relations with railroad employers by the terms of the Railway Labor Act and all other pertinent acts of the Acts of Congress, all or nearly all of the Brotherhood's members being engaged in commerce among the several states.

5. Petitioner W. P. Kennedy is a member of the Brotherhood, is its President, and joins its Petitioner in this [165]

matter on behalf of himself and all other members of the Brotherhood of Railroad Trainmen.

6. The Brotherhood's members and the survivors of deceased members have many claims arising or sued upon in Illinois.

7. Railroading is one of the most hazardous occupations in the world. It is more hazardous than mining. The work of railroad trainmen comprises in general the most hazardous phase of railroading. For many years prior to 1929, it was the fact (and despite the efforts of the Brotherhood, it is still true) that in many thousands of instances when trainmen were seriously injured or killed in railroad operations, claim agents for the railroads have effected small and wholly inadequate settlements with such injured trainmen or the personal representatives of deceased trainmen. This they were able to do because such injured trainmen or representatives of the deceasd trainmen were unversed in the law and had no competent legal advice. Moreover, it was the practice of many railroads to discharge injured employees unless they settled their claims for injuries without suit or before making claims entirely.

8. On the other hand, it was true before the formation of the Brotherhood, has been true ever since and is still true that many lawyers abuse the confidence of their clients by

(1) Effecting low settlements in the case in order to obtain a higher settlement in some other case against the same railroad,

(2) Incompetently preparing and processing such cases upon the law or the facts,

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(3) Not fully and fairly explaining to the client the terms of the employment, so that the client after having assented to settlement, finds the proceeds thereof surcharged with items for expenses of litigation, medical expense, expenses of one sort and another or the like, which are not legitimate, or if legitimate, were not explained to him before the settlement was concluded, as well as in other ways.

9. The Brotherhood of Railroad Trainmen is a labor organization not for profit. Its objects are set forth in the Preamble to the Constitution of the Brotherhood of Railroad Trainmen:

"To unite the Railroad Trainmen, Bus Employes and Dining Car Stewards, to promote their general welfare and advance their interest, social, moral, political, economic and intellectual; to protect their families by the exercise of benevolence, very needful in a calling so hazardous as ours, this fraternity has been organized.

"Persuaded that it is for the interests both of our members and their employers that a good understanding should at all times exist between the two, it will be the constant endeavor of this organization to establish mutual confidence, and create and maintain harmonious relations.

"Such are the aims and purposes of the Brotherhood of Railroad Trainmen."

Its objects are the amelioration of the condition of railroad trainmen in matters of compensation, hours, senior-

ity, pension, tenure, working conditions and safety. It is to the interest of the Brotherhood and its members that [167]

adequate compensation be recovered for every injury resulting from violation of safety appliance measures, or from other instances of negligence, not only for the sake of the injured member or the survivors of a deceased member, but because the exaction of such adequate compensation from the railroad is a strong deterrent to these violations of safety appliance measures and unsafe practices that take such a heavy toll of health, well-being and life. The exaction of adequate compensation for each injury or death due to unsafe railroad practices is to the advantage of every member of the Brotherhood, whether or not he himself is ever injured or killed.

10. Such adequate compensation cannot in general be exacted if members of the Brotherhood are either persuaded by claim agents to settle their own claims or place them in the hands of incompetent, inexperienced, or otherwise inadequate counsel.

11. In the year 1930, A. F. Whitney, President of the Brotherhood of Railroad Trainmen, said in his official annual report to the Brotherhood for that year:

> "During the course of my several years experience as an officer of the Brotherhood it has come to my attention on a number of occasions, that injured members of the organization, and the dependents of members who had been killed while engaged in railroad service, had fared rather badly at the hands of railroad claim agents in some instances, as well as at the hands of so-called ambulance chasing lawyers in other instances.

"In many cases settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers had been made with

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members of the Brotherhood who were either entirely devoid of any knowledge of their rights in such matters, or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements. In still other cases, attorneys had either suffered defeat in lawsuits because of their inexperience or lack of ability to properly prosecute railroad damage claims.

"In many cases attorneys had charged the injured man what happened to be highly exorbitant fees for the service rendered."

12. At the present time, there are fifteen Regional Counsel for the Brotherhood, each such Counsel representing the Brotherhood and its members with respect to the territory assigned to him. The representation assigned to each such Regional Counsel, respectively, is by railroad and not by state or geographical limits, so that a Regional Counsel may be representing the members of the Brotherhood employed by one railroad which is in geographical territory where members of the Brotherhood employed by another railroad are represented by another Regional Counsel.

13. Edward B. Henslee is both the General Counsel and one of the Regional Counsel for the Brotherhood, as Regional Counsel represents the interests of the Brotherhood and its members with respect to the following segments of the following railroads respectively: INDIANA: All railroads except Baltimore & Ohio employees in Washington, and Seymour, Indiana; except Southern Railroad Com-

pany employees in New Albany, Indiana and Princeton, Indiana; except on the Chicago, Milwaukee, St. Paul

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& Pacific Railroad; OHIO: All members employed by railroads in Ohio; ILLINOIS: All railroads down to a line drawn north of Danville to Quincy, except employees of Rock Island, Chicago Great Western, Soo Line, M. & St. L; Chicago & North Western, Chicago, Milwaukee, St. Paul & Pacific, Chicago Burlington & Quincy; Atchison, Topeka & Santa Fe; PENNSYLVANIA: All railroads except Delaware, Lackawanna & Western, Lehigh Valley, Central Railroad of New Jersey, Baltimore & Ohio, D. & H., Erie, L & N E, and Reading; MICHIGAN: All employees of railroads except those which run into the upper peninsula of the state.

14. Regional Counsel in general, and Edward B. Henslee and his associates in particular, represent the Brotherhood and its members in labor relations and other matters with the railroads by whom those members are employed. Such representation includes, *inter alia*, the rendering of legal assistance in the matter of negotiating and enforcing collective bargaining agreements between the Brotherhood and its members, on the one part, and the employing railroad or railroads, on the other part, the advising of the Brotherhood and its members as to the scope, intent and effect of contracts in effect or proposed, the processing of grievances on behalf of individual members or groups of members by negotiation, arbitration or in proceedings under the Railway Labor Board under the Railway Labor Act (45 U. S. C. A., Sections 151-188, incl.), and the like. More particularly, Regional Counsel in general and Edward B. Henslee and his associates in particular, advise

upon, process, negotiate, and where necessary litigate claims with respect to rates of pay, overtime pay, seniority, working conditions and safety matters.

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15. Edward B. Henslee, as General Counsel, advises the President and other Grand Lodge officers with respect to similar matters, that is, the negotiation and conclusion of contracts, the enforcement thereof, the effect, intent and operation thereof, and matters concerning rates of pay, overtime pay, seniority, grievances and safety conditions.

16. As Regional Counsel of the Brotherhood of Railroad Trainmen, Edward B. Henslee is one of legal Counsel for the Brotherhood's Legal Aid Department.

17. The organic instrument constituting the Brotherhood of Railroad Trainmen and providing for the organization of its government is the Constitution of the Brotherhood of Railroad Trainmen as amended at the twenty-eighth Convention held at Miami Beach, Florida, September 16th to November 16th, 1946, inclusive. As an addendum to Section 104 of the Constitution, it is provided as follows:

> "Under date of August 15, 1930, Special Circular No. W-32 was addressed to secretaries of all lodges of the Brotherhood in the United States, requesting that each lodge designate at least one member whose duty it would be to submit to the Legal Aid Department preliminary reports on all cases of accidental injury or death to our members on railroads. At the same time blanks were forwarded to all lodges for use in making such reports, and it was suggested that probably it would be advisable to select local chairman for this purpose, but that where the presi-

dent, secretary and treasurer, or some lay member of the lodge, was in better position to handle the reports, one of such officers or members should be selected.

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"Many of our lodges and members have cooperated splendidly in getting these reports to the Legal Aid Department, but in some instances the department has not been able to render any service to injured members, or to dependents of members killed in railroad service, because of failure to receive the necessary reports. The department cannot, of course, be of the assistance intended, unless it has the cooperation of all concerned.

"Therefore, in accordance with Section 104 of the Constitution, which provides that the secretary shall conduct the correspondence of subordinate lodges, the secretaries of all lodges in the United States will accept this as official notice that it shall be their duty to report to the Legal Aid Department each case where a member of their respective lodges is accidentally injured or killed while engaged in railroad service.

'While a statement of some of the important facts in each case is desirable, a report of the name and address of the member concerned, the names and addresses of his dependents if the member was killed, the name of the railroad, the time and place of the accident, and whether injury or death occurred, is sufficient if promptly forwarded to the department. Promptness in making these reports is very essential and, therefore, they should not be delayed awaiting the development of facts other than as above stated.

"As indicated, a supply of blank forms for use in submitting these reports has previously been forwarded to all lodges in the United States. If an additional supply of such forms is required by the secretary of any lodge, they will be furnished upon request."

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18. The manner and mode by which the Brotherhood effect *liaison* between such of its members injured in or incidentally to railroad operations and Legal Aid Department is as follows:

It is the duty of the Local Chairman of any Lodge of the Brotherhood to call immediately upon any member of the Lodge who has been disabled by illness or injury. If the member has been disabled by injury sustained in the course of his employment by a railroad, the Local Chairman of the Lodge regularly, normally, and as a part of his duties and obligations as such Local Chairman, informs the member: :

(1) That he is entitled to consult the Legal Aid Department, which means the Regional Counsel, free of charge, for advice as to his rights and the liability of the railroad under the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-59, incl.), the Federal Boiler Inspection Act (45 U.S.C.A., Section 23), the Federal Safety Appliance and Equipment Act (45 U.S.C.A., Sections 1-16, incl.), and State Workmen's Compensation Act that may be applicable or any other pertinent law, and

(2) That if, but not unless, the member desires the Legal Aid Department to represent him in negotiations, settlement or suit, the Regional Counsel will

do so provided that the case is, in the opinion of the Regional Counsel, one within the Act. There is no requirement that any member be represented by the Legal Aid Department or by Regional Counsel, and any member is free to select any member of the Bar whom he desires as his Counsel, or to conduct his own negotiations and effect his settlement if he cares to to do so. This is true whether the member has or has

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not consulted the Regional Counsel. Local Chairman ordinarily recommend that cases of injured members of the Brotherhood be handled by the Legal Aid Department.

19. The history, organization and operation of the Legal Aid Department of the Brotherhood of Railroad Trainmen is accurately described by the Brotherhood in a document entitled *The Brotherhood of Railroad Trainmen Legal Aid Department*, which document was published in the *Official Yearbook and State Meeting Program* published in the year 1953 under the auspices and by the authority of the Brotherhood. That publication was generally disseminated among members of the Brotherhood. In it members are urged to avail themselves of the services of the Legal Aid Department.

20. Petitioners further assert that the reasons, purpose and spirit of all Statutes, Rules of Law, and Canons of Ethics inhibiting the volunteering of legal services, whether the services be those of the volunteers or those of some lawyer or lawyers other than the volunteers, is to prevent persons having no actual legally cognizable interest in the subject matter of a pending or potential dispute from interfering or intermeddling in such dispute. Those Laws, Rules and Canons are not intended

to and do not inhibit persons having a genuine and legitimate interest in disputes other than a mere desire to interfere in them with or without gain from calling upon the parties to such disputes and recommending legal action, including the recommending of legal counsel. Members of an industry and their representatives have a right to advise, encourage and finance in whole or in part such legal action on the part of members or representa-

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tives as will set precedents that will be of value to other members of the same industry. Trade Associations, Manufacturers' Association, Newspapers Publishers' Associations and other groups organized for the protection of members united by a common economic calling or activity regularly advise, encourage, recommend and frequently finance litigation, the result of which will, in all likelihood, influence the economic or other interests of the members.

21. In their conduct and actions in the premises, Petitioner rely in part upon the decision of the Appellate Court of Illinois in the First District in the case of *Ryan* v. *Pennsylania R.R.*, 268 Ill. App. 364, where the injured railroad man had settled directly with the railroad after notice of statutory attorney's lien, the Court saying that the railroad's defense that plaintiff's employment had been obtained by solicitation and fee splitting was "unworthy of the able lawyers who made it."

22. In their conduct and actions in the premises, Respondents rely in part upon the expression of Henry S. Drinker, Chairman of the Standing Committee on Professional Ethics and Grievances, American Bar Association, in his work, LEGAL ETHICS, published in the Legal Studies of the William Nelson Cromwell Founda-

tion and printed by Columbia University Press, New York, in 1953, on page 167 of that work, where he says:

> "It is not believed that the Canon will prevent the labor unions from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially
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> lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public."

23. The Brotherhood and all of its members have a legitimate and legally cognizable interest in recovery by adjudication or settlement arising in claims out of the injuries or deaths of members in railroading, because such recoveries set precedents not only in the form of adjudications but in the patterns and customs of railway accident settlements, for recoveries in later cases.

24. Under provisions of the Federal Railway Labor Act (45 U.S.C.A., Sections 151-164, incl.), the Brotherhood of Railroad Trainmen is entitled to represent its members in the processing of grievances, either in negotiation, settlement, arbitration, administrative litigation before the Railway Labor Board, or other administrative tribunal, or judicial proceedings. Included among the types of grievances with respect to which the Brotherhood is authorized to represent its members are claims of violation of the Federal Employers' Liability Act and

the cognate statutes, either by seeking the institution of prosecutions for such violations, or, with the members' consent, by instituting litigation for recovery of damages sustained on account of such violations.

25. The Committee on Inquiry of the Chicago Bar Association has instituted before that Association's Grievance Committee, sitting as Commissioners under this Court's Rule 58, a complaint against petitioners.

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26. Respondents have filed before the Commissioners their "Motion for Rule on the Complainant to File Reply or other Pleading Responsive to Respondents' Answer to Second Amended Complaint."

27. The Grievance Committee has denied the motion mentioned in the paragraph next above.

28. Petitioners are informed, believe and upon such information state the fact to be that a hearing upon the charges set forth in the above-mentioned complaint will consume from two to six years of the time of the commissioners, of the respondents in that proceeding and of counsel for the complainant.

29. If as petitioners' counsel, respondents in those proceedings are compelled to prove the matters set forth in this answer, the expense in time, effort and money will be great indeed.

30. Petitioners do not ask this Court to adjudicate upon this petition any question as to whether in any specific, particular case, petitioners' counsel or persons associated with petitioners' counsel obtained business by any means other than that above described. The charges that petitioners have obtained business by unprofessional means and the charges that petitioners' coun-

sel have been guilty of other unprofessional conduct in specific cases, all of which charges are denied, tender issues of fact that cannot be tried upon this petition and are appropriately subject to the jurisdiction of the Grievance Committee and the Board of Managers of the Chicago Bar Association as this Court's Commissioners under this Court's Rule 58.

31. But petitioners represent to this Court that the question whether petitioners may properly maintain a [177]

legal aid department, that is, attorneys whom the Brotherhood's representatives recommend to only members and survivors of deceased members and only in connection with claims for personal injuries, back pay, seniority, overtime pay, pension rights and other claims arising out of the relationship of employer and employee, the Brotherhood's representatives being reimbursed for their time, effort and expenses in the manner described in this petition, of paramount importance to the members of the Brotherhood, to the railroads and to the Bar. That question may be decided without any recourse to the specific facts of any particular case.

32. Petitioners have requested the Members of the Grievance Committee to rule upon the question presented but the Committee has expressly declined to do so.

Wherefore petitioners move and pray this Court for a declaratory judgment of an order giving directions with respect to matters within the purview of the following question:

> May the Brotherhood of railroad trainmen, a labor union whose members are engaged in intrastate and

interstate commerce, provide a staff of counsel, urge its members to avail themselves of the services of such counsel in grievances and claims arising out or railroad employment and compensate its representatives for their time, effort and expenses in recommending and urging members of the Brotherhood to avail themselves of such services?

WILLIAM C. WINES,

Room 810, 139 North Clark St.,
Chicago, Ill.
Telephone: ST 2-5925

Attorney for Petitioner.

* * * * *

(Plaintiff's Exhibit 3 Omitted in Printing.)

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN (continued)			
David Patrick, Detroit	Bruce, Parkhill, Chicago & J. F. Wilson, Detroit	$18,859	NYC
Raymond Lewis, Detroit	Peters & Kelly, Detroit	60,000	GTW
E. J. Dudzik, Detroit	E. H. Schink, Detroit	1,000	GTW
E. K. Ihlenfeldt, Detroit	"	4,000	NYC
Arnold Maciejewski, Detroit	"	4,750	GTW
J. E. Ussery, Jr., Detroit	"	12,000	NYC
Henry VanRiper, Detroit	"	(Def't Verd)	NYC
P. B. Zackery, Detroit	"	4,500	NYC
Luciano Cerda, Grand Rapids	L. W. Walsh, Grand Rapids	....	C&O
Frank Port, Detroit	Carl Weideman, Detroit	1,500	GTW
Delmar Miller, Detroit	F. K. Young, Detroit	17,500	Wab
H. L. Kelly, Michigan Center	Whitehead & Brady, Toledo	....	NYC
CASES HANDLED IN ILLINOIS			
C. L. Bollinger, Jackson	L. T. Bailey, Chicago	15,800	NYC
L. L. Trumble, Vandercook Lake	"	17,500	NYC
Matthew Stenhouse, Three Rivers	W. A. Creditt, Chicago	825	CMStP&P
W. H. Freeman, Kalamazoo	J. A. Dooley, Chicago	39,000	NYC
T. A. Allen, Lincoln Park	B. Fleischman, Chicago	325	B&O
Francis McMinn, Pontiac	Fuerst & Fuerst, Schwartberg & Barnett, Chicago	8,900	GTW
E. T. Young, Battle Creek	"	30,000	GTW
A. E. Basso, Battle Creek	B. E. Heirich, Chicago	....	GTW
D. D. Dickey, Battle Creek	"	....	GTF
J. R. Greenway, Pontiac	"	40,000	GTW
Leland Merrill, Dearborn	"	20,000	NYC
Clayton Nielsen, Lansing	"	....	GTW
D. B. Reece, Battle Creek	"	....	GTW
E. M. Schramm, Jackson	"	35,000	NYC
Dale Beisheim, Lansing	Henslee, Monek & Murray, Chicago	1,500	GTW
J. E. Benedict, Detroit	"	....	GTW
Stanley Besk, Detroit	"	....	C&O
Geo. Blackwell, Detroit	"	....	GTW
Harry Bordick, Detroit	"	....	GTW
Alexander Boyd, Battle Creek	"	....	GTW
F. C. Chidester, Port Huron	"	5,000	GTW
Russell Christenson, Grand Rapids	"	....	C&O
Joseph Clay, Battle Creek	"	....	GTW
J. L. Conaway, Pontiac	"	....	GTW
H. E. Conklin, Battle Creek	"	....	GTW
F. H. Cornett, Detroit	"	....	GTW
Gerald Corning, Detroit	"		

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS (continued)			
Lee Davis, Port Huron	Henslee, Monek & Murray, Chicago	$	GTW
J. C. DeBarr, Pontiac	"	....	GTW
Theodore DeHarde, Ferndale	"	....	GTW
Harold Dolehanty, Durand	"	42,000	GTW
H. E. Doll, Detroit	"	....	GTW
John Duncan, Detroit	"	....	GTW
Worth Eastman, Dryden	"	....	GTW
Arthur Elgee, Pontiac	"	....	GTW
Alfred Erwin, Pontiac	"	....	GTW
Wm. Ervin, Pontiac	"	....	GTW
J. F. Finn, Detroit	"	....	GTW
Wm. Harden, Rochester	"	3,250	GTW
John Hillenbrand, Detroit	"	30,000	Wab
D. J. Houk, Jackson	"	16,500	NYC
J. D. Hubble, Flint	"	....	C&O
Nicolo Lacedra, Benton Harbor	"	3,000	C&O
H. A. Leapley, Wyandotte	"	5,000	DT&I
Richard Luotonen, Detroit	"	4,300	GTW
Thomas Mero, Kalamazoo	"	5,000	GTW
Robert Morrison, Detroit	"	50,000	GTW
J. F. Murphy, Wyandotte	"	14,000	Pa
C. J. Nemcock, Allen Park	"	16,000	NYC
P. M. Noel, Grand Rapids	"	....	C&O
J. G. Richards, Battle Creek	"	4,450	GTW
(Year of settlement is not indicated in reports furnished covering the cases of Dale Beisheim through J. G. Richards, listed above.)			
1945 Settlements:			
Albert R. Baum, Springport	Henslee, Monek & Murray, Chicago	1,900	NYC
Robert H. Cox, Detroit	"	6,000	NYC
W. C. Nichols, Port Huron	"	3,250	NYC
R. A. Stahl, Detroit	"	1,250	NYC
D. C. Trine, Jackson	"	15,000	NYC
G. E. Worrell, Grand Rapids	"	9,500	NYC
1946 Settlements:			
O. H. Brewer, Kalamazoo	"	5,000	NYC
R. A. Clock, Battle Creek	"	4,000	NYC
R. W. Stephens, Detroit	"	5,000	NYC
Carlton Waite, Highland Park	"	8,000	NYC

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS (continued)			
1947 Settlements:			
A. L. August, Dearborn	Henslee, Monek & Murray, Chicago	$24,999	NYC
J. L. Bush, Dearborn	"	2,000	NYC
P. M. Cleary, Detroit	"	1,750	NYC
H. C. Frank, Jackson	"	4,000	NYC
R. E. Maher, Jackson	"	2,500	NYC
C. E. Spencer, Detroit	"	3,500	NYC
E. F. Thompson, Detroit	"	2,500	NYC
1948 Settlements:			
N. J. Molander, Northville	"	750	NYC
O. R. Pulliam, Detroit	"	7,500	NYC
1949 Settlements:			
R. F. Coady, Detroit	"	3,000	NYC
J. L. Emery, Detroit	"	5,000	NYC
O. R. Hasselberg, Detroit	"	3,500	NYC
C. J. Hyde, Detroit	"	17,500	NYC
C. R. Kahl, Farmington	"	900	NYC
Sam Plummer, Detroit	"	6,750	NYC
1950 Settlements:			
J. D. Adams, Sr., Detroit	"	10,000	NYC
R. J. Coyne, Jackson	"	1,000	NYC
Leon Graham, Lincoln Park	"	4,000	NYC
L. S. Lucas, Detroit	"	1,500	NYC
P. H. Townsend, Detroit	"	20,000	NYC
1951 Settlements:			
F. L. Cabana, Detroit	"	22.500	NYC
Edward Ebel, Bay City	"	12,500	NYC
W. W. King, Ferndale	"	13.500	NYC
R. W. Peterson, Detroit	"	55,000	NYC
F. F. Winters, Detroit	"	27,500	NYC
Tom Zambetis, Detroit	"	15,000	NYC
1952 Settlements:			
George Atherton, Dearborn	"	3,500	NYC
F. C. Brown, Detroit	"	3,500	NYC
H. M. Deppner, Detroit	"	1,250	NYC

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS (continued)			
1952 Settlements (continued):			
D. H. Farmiloe, Detroit	Henslee, Monek & Murray, Chicago	$ 6,000	Wab
V. A. Janson, Jackson	"	5,000	NYC
W. H. Main, Battle Creek	"	26,500	NYC
J. H. Marts, Jackson	"	2,000	NYC
C. A. Randolph, Detroit	"	1,500	NYC
V. V. Rickey, Detroit	"	5,000	Wab
E. E. Sharples, Kalamazoo	"	11,000	NYC
Ralph Shelton, Inkster	"	24,850	NYC
S. M. Sherman, Romulus	"	50,000	Wab
1953 Settlements:			
E. J. Bailey, Highland Park	"	9,000	NYC
K. H. Bedore, Jackson	"	6,500	NYC
R. C. Crow, Detroit	"	33,000	NYC
Hadold Dolehanty, Durand	"	42,000	GTW
Wm. Henzel, Detroit	"	7,500	NYC
H. J. Kerry, Detroit	"	8,500	NYC
L. A. Martin, Bay City	"	12,750	NYC
H. R. Pease, Kalamazoo	"	13,125	NYC
Orville Williamson, Detroit	"	600	NYC
W. M. Wilsdon, Dearborn	"	3,500	NYC
1954 Settlements:			
E. W. Beckwith, Battle Creek	"	50,000	GTW
Peter Grabowski, Bay City	"	13,500	NYC
G. J. Grant, Jackson	"	6,000	NYC
Wm. Greenaway, Birmingham	"	6,000	NYC
E. C. Ketz, Taylor Center	"	8,000	NYC
R. E. Rumfelt, Dearborn	"	7,500	NYC
R. O. Schaufele, Lincoln Park	"	8,000	NYC
G. T. Schneider, Bay City	"	6,000	NYC
F. A. Smith, Detroit	"	7,500	C&O
J. W. Swan, North Adams	"	11,000	NYC
J. E. Swanson, Jr., Detroit	"	17,500	NYC
E. T. Swiontek, Detroit	"	62,500	NYC
H. F. Tigar, Kalamazoo	"	1,750	NYC
H. H. Woodruff, Ypsilanti	"	7,500	NYC
1955 Settlements:			
W. L. Ausum, Jr., Bay City	"	3,500	NYC
Benjamin Hawkins, Detroit	"	8,000	GTW
J. P. Healy, Battle Creek	"	1,200	NYC
Kenneth Lierman, Durand	"	14,000	GTW
C. L. Miller, Bay City	"	6,500	NYC

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS (continued)			
W. W. Hicks, Monroe	L. M. Marko, Detroit	$15,000	NYC
Odie Green, Kalamazoo	Ritsos & Ritsos, Chicago	10,000	NYC
Russell Henry, Ludington	S. E. Sampliner, Cleveland	4,500	C&O
L. E. Mandenhall, Niles	Smietanka, Nowak & Garrigan, Chicago	5,000	NYC
J. W. Evans, Detroit	Zacksman, Shandorf & Rosmarin, Chicago	150	CMSTP&P
CASES HANDLED IN MINNESOTA			
E. C. Bodin, Two Harbors	Davis, Rerat, Yaeger & Lush, Minneapolis	11,500	DM&IR
M. W. Dixon, Ironwood	"	27,500	C&NW
L. M. Ferdis, Alpena	"	39,500	Grt Nor
J. M. Hendrickson, Gladstone	"	26,000	Soo
CASES HANDLED IN OHIO			
M. R. Williams, Jackson	A. H. Dudnik, Cleveland	4,190	NYC
T. E. Stewart, Pontiac	"	21,500	NYC
CASES HANDLED IN PENNSYLVANIA			
E. W. Clark, Detroit	Meyer, Lasch, Hankin & Poul, Philadelphia	9,500	P&LE
Mary R. Kotlowski, Jackson	"	11,000	NYC

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	38	$ 371,720
Cases handled by Henslee firm	126	1,191,064
Cases handled by other attorneys	33	503,349
Totals	197	$2,066,133

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PLAINTIFF'S EXHIBIT 4

SETTLEMENTS IN

F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO MARCH 31, 1955

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
Arnold McGhee, Detroit	Dann & Rosenbaum, Detroit	$	C&O
R. T. Heffernan, Hillsdale	A. D. Dudnik, Cleveland	49,500	NYC
B. C. West, Detroit	S. C. Downes, Detroit	....	NYC
M. W. Bernecker, Bay City	Fuerst & Fuerst, Chicago	....	C&O
Benj. Earnest, Saginaw	"	....	C&O
L. F. Hogg, Pontiac	"	10,000	GTW
R. J. Smith, Fosters	"	17,500	C&O
Joseph Bak, Detroit	E. Groefsema, Detroit	....	NYC
N. J. Wilyard, Detroit	F. M. M. Hally, Detroit	18,500	NYC
J. Rogoszewski, Saginaw	Heilman & Purcell, Saginaw	....	C&O
R. F. Baker, Detroit	Henslee, Monek & Murray, Chicago	3,750	C&O
J. D. McBee, Detroit	"	....	C&O
Harry Bassett, Wayne	"	8,500	NYC
B. G. Couch, Detroit	"	20,240	NYC
H. C. Frank, Jackson	"	9,500	NYC
W. H. Leslie, Jackson	"	40,000	NYC
Fred Wohlgemuth, Detroit	"	5,000	NYC
R. F. Wolfe, Munith	"	6,000	NYC
Alexander Borkowski, Dearborn	"	17,000	NYC
F. E. Miller, Detroit	"	20,000	C&O
H. L. Murphy, Saginaw	"	2,000	C&O
D. T. Russell, Kalamazoo	"	8,500	NYC
C. R. Busha, Flint, Mich.	R. J. MacDonald, Flint	5,100	C&O
R. W. Irving, Jackson	Marcus, Kleman, etc., Detroit	29,800	NYC
J. I. Green, Jackson	"	24,000	NYC
Harry King, Detroit	"	5,000	NYC
Victoria Zdun, Detroit	"	6,000	NYC
C. M. Brown, Jackson	"	26,000	NYC
F. DeBiasi, Jackson	"	1,350	NYC
John Kielar, Jackson	"	9,000	NYC
R. E. Naas, Detroit	"	3,500	NYC
Monroe Harrison, Detroit	"	3,100	NYC
Harry Oosterhart, Muskegon	Marcus & McCroskey, Muskegon	(Dismissed)	C&O
L. J. Babcock, Jackson	L. M. Marko, Detroit	2,500	NYC
Michael Blaszkowski, Wayne	"	12,500	NYC
W. J. Brieger, Jackson	"	3,000	NYC
G. C. Dunn, Port Huron	"	19,000	GTW
K. G. Little, Detroit	"	10,000	NYC
H. P. Martin, Durand	"	4,795	GTW
F. J. Ronan, Port Huron	"	825	GTW
L. W. Scheffler, Port Huron	"	50,000	GTW
R. H. Steele, Birch Run	"	1,500	GTW
Erwin Foshag, Monroe	V. D. Martin, Detroit	....	NYC
D. H. Hornberger, Jr., Detroit	H. J. Meurer, Detroit	16,000	NYC
R. W. Irving, Jackson	Meyer, Lasch, Hankin & Poul, Philadelphia, and J. W. Kelman, Detroit	29,800	NYC

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PLAINTIFF'S EXHIBIT 6

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD APRIL 1, 1955 TO DECEMBER 31, 1955

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
F. S. Londo, Detroit	Cary & BeGole, Detroit	$ 4,000	NYC
Nick Baca, Detroit	Carl Gussin, Detroit	1,250	GTW
F. J. Blondin, Carrollton	Henslee, Monek & Murray, Chicago	15,000	NYC
R. W. Cagle, Detroit	"	22,500	C&O
J. L. Cramer, Bay City	"	30,000	NYC
Samuel Gentelia, Mt. Elliott (Detroit)	"	25,000	NYC
J. W. Gollick, Dearborn	"	5,500	NYC
N. B. Long, Jackson	"	6,500	NYC
W. F. Nael, Detroit	"	15,000	NYC
D. C. Pero, Bay City	"	6,490	NYC
J. L. Smith, River Rouge	"	21,500	C&O
H. B. T. Hocking, Detroit	Marcus, Kelman, etc., Detroit	3,500	GTW
L. E. McFall, Battle Creek	Markle, Markle & Urbank, Detroit	14,000	NYC
R. E. Pinkerton, Hillsdale	L. M. Marko, Detroit	9,500	NYC
G. E. Richards, Saginaw	"	5,000	C&O
Leroy Steagall, Inkster	"	100	B&O
D. G. Garrett, Detroit	B. Parkhill, Chicago & J. F. Wilson, Detroit	2,500	NYC
R. J. Clancy, Detroit	D. Rosen & J. A. Markle, Detroit	6,000	Pa
W. A. Dearing, Detroit	E. H. Schink, Detroit	15,000	NYC
Albert Neely, Detroit	"	16,500	GTW
V. H. Woodrough, Mason	"	2,000	NYC
E. W. Sahr, Monroe	Cameron Buchanan, Detroit	10,000	C&O
CASES HANDLED IN ILLINOIS			
Edward Bransberger, Holland	J. A. Dooley, Chicago	25,000	Pa
R. F. Bauschka, Detroit	Henslee, Monek & Murray, Chicago	3,000	NYC
J. D. Bedwell, Pontiac	"	18,300	GTW
O. F. Brown, Bay City	"	7,500	NYC
W. H. Cohenour, Carleton	"	5,000	DT&I
V. A. Johnson, Jackson	"	800	NYC
C. A. Koch, Detroit	"	9,900	NYC
J. D. McKenzie, Detroit	"	25,000	NYC
W. L. Peacock, Detroit	"	885	NYC
O. A. Running, Battle Creek	"	17,750	GTW
Arnold Shumaker, Flat Rock	"	5,000	DT&I
H. M. Velasquez, Detroit	"	2,000	GTW
R. J. Welch, Jackson	"	2,000	NYC
Orville Williamson, Detroit	"	5,000	NYC
S. J. Riley, Kalkaska	S. Sacks & L. G. Davidson, Chicago	12,000	GTW
CASE HANDLED IN MINNESOTA			
G. A. Rivest, Gladstone	Davis, Rerat, Yaeger & Lush, Minneapolis	11,900	Soo

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD APRIL 1, 1955 TO DECEMBER 31, 1955 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN PENNSYLVANIA			
O. E. Miller, Detroit	Meyer, Lasch, Hankin & Poul, Philadelphia	$ 3,500	B&O
L. S. Wilde, Detroit	"	3,000	NYC

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	12	$ 86,850
Cases handled by Henslee firm	22	249,625
Cases handled by other attorneys	6	57,900
Totals	40	$394,375

(Plaintiff's Exhibit 7 Omitted in Printing.)

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PLAINTIFF'S EXHIBIT 8

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1956 TO DECEMBER 31, 1956

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
K. M. Saylor, Adm. Pete Manni, Dec'd, Pontiac	M. L. Bacow, Pontiac	$15,000	GTW
Jos. McDaniel, Monroe	Golden & Merman, Monroe	2,500	NYC
B. L. Anderson, Grand Rapids	Henslee, Monek & Murray, Chicago	6,250	NYC
E. J. Hanley, Detroit	"	25,000	NYC
V. A. Holbrook, Detroit	"	9,500	NYC
John Kingham, Saginaw	"	16,000	C&O
E. M. Myers, Jackson	"	15,000	NYC
J. F. Galombeski, Grand Rapids	Linsey, Shivel, etc., Grand Rapids	750	C&O
B. F. Chase, Detroit	A. C. Lumley, Detroit	1,000	NYC
H. H. Albright, Monroe	L. M. Marko, Detroit	1,200	NYC
R. K. Alexander, Detroit	"	400	NYC
C. D. Bennett, Manton	"	7,500	NYC
C. H. Moreland, Detroit	"	125	NYC
H. E. Reed, E. Detroit	"	6,000	NYC
Clark Avery, Dearborn	Porritt, Freud, etc., Detroit	(Dismissed)	D&TSL
J. P. Bommarito, Detroit	Fred Potvin, Detroit	9,000	NYC
P. P. Patterfritz, Monroe	F. T. Ready, Monroe	30,000	NYC
C. L. Hammock, Jackson	E. H. Schink, Detroit	4,000	NYC
Ronald McDonald, Battle Creek	Frank Sibley, Detroit	750	C&O
CASES HANDLED IN ILLINOIS			
L. R. Spaulding, Two Rivers	Bernard Fleischman, Chicago	2,000	CMStP&P
C. J. Landmesser, Detroit	Heirich & Hickey, Chicago	3,750	NYC
C. M. Brown, Lansing	Henslee, Monek & Murray, Chicago	7,500	GTW
A. J. Delucia, Kalamazoo	"	2,000	NYC
S. L. Doody, Detroit	"	6,500	NYC
D. L. Graham, Jackson	"	1,200	NYC
J. W. Greer, Detroit	"	15,000	GTW
John Klask, Detroit	"	8,000	NYC
Lawrence LaFeve, Detroit	"	13,500	Union Belt Detroit
Dewey Pollock, Niles	"	3,500	NYC
L. J. Syson, Niles	"	15,000	NYC
CASE HANDLED IN INDIANA			
R. A. Gagne, Niles	Henslee, Monek & Murray, Chicago	18,750	NYC
CASES HANDLED IN PENNSYLVANIA			
B. M. Vesey, Ottawa Kale	Meyer, Lasch, Hankin & Poul, Philadelphia	6,000	NYC

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1956 TO DECEMBER 31, 1956 (continued)

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	14	$ 78,225
Cases handled by Henslee firm	15	162,700
Cases handled by other attorneys	3	11,750
Totals	32	$252,675

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PLAINTIFF'S EXHIBIT 10

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1957 TO DECEMBER 31, 1957

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
J. M. Giftopoulis, Jackson	C. E. Baker, Detroit	$ 1,000	NYC
Nicola Guerra, Detroit	Bernstein & Bernstein, Detroit	4,500	Wab
B. A. Ritter, Lansing	D. Rathbun, Lansing & Carl Davidson, Detroit	24,000	GTW
F. W. Haneberg, Dearborn	Henslee, Monek & Murray, Chicago	20,000	NYC
H. L. Brenner, Battle Creek	Kelly & Kelly, Jackson	(Dismissed)	GTW
Sam Collins, Jackson	Kelly, Kelly & Kelly, Jackson	1,250	NYC
Jas. L. Mull, Detroit	L. E. Kozlow, Detroit	10,000	B&O
Monroe Harrison, Detroit	Marcus, Kelman, etc., Detroit	1,750	NYC
Warden Herman, Jackson	Markle & Rosenburg, Detroit	2,500	NYC
Richard Bellenbaum, Saginaw	L. M. Marko, Detroit	13,000	C&O
T. W. Christie, Oak Park	"	500	NYC
J. E. Espy, Dec., Battle Creek	"	3,500	GTW
D. H. Gingrich, Port Huron	"	2,250	GTW
R. E. Grubba, Roseville	"	3,000	NYC
Frank Haslego, Detroit	"	110	NYC
R. T. Host, Grand Rapids	"	7,000	C&O
L. A. LaFontaine, Royal Oak	"	7,500	NYC
Kenneth McCobb, Detroit	"	72,500	NYC
H. J. McLaughlin, Detroit	"	1,550	NYC
J. C. Meade, Detroit	"	12,500	DT&I
J. F. Meyer, Ecorse	"	1,000	NYC
R. S. Parent, Detroit	"	4,000	NYC
R. J. Rebant, Detroit	"	2,100	NYC
C. J. Turner, Detroit	"	75,000	Wab
Wm. Nagel, Bay City	John Purcell, Saginaw	65,000	NYC
Elbert Harris, Jackson	Haskell Nichols, Jackson	800	NYC
Walter Ewald, Detroit	E. H. Schink, Detroit	4,000	NYC
G. W. Farrington, Detroit	"	9,500	GTW
H. W. Hays, Bath	"	10,000	NYC
B. P. Leonards, Detroit	"	22,300	C&O
F. C. Murray, Detroit	"	3,500	GTW
J. P. Pondo, Detroit	"	28,500	GTW
H. R. Rouse, Detroit	"	1,500	NYC
Frank Calandrino, Grand Rapids	A. J. Selburn, Detroit	15,000	C&O
A. C. Hall, Detroit	Earl I. Sherman, Detroit	25,000	Wab
C. E. Martin, Clarkston	F. C. Sibley, Detroit	1,600	GTW
E. J. Zielinski, Detroit	Zwerdling, Zwerdling, etc., Detroit	35,000	NYC

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1957 TO DECEMBER 31, 1957 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS			
W. J. Beer, Detroit	B. E. Heirich, Chicago	$30,000	GTW
W. P. Bilokury, Inkster	Heirich & Hickey, Chicago	2,375	NYC
J. R. Abercrombie, Jr., Carleton	Henslee, Monek & Murray, Chicago	750	DT&I
R. J. Arthur, Jackson	"	2,000	NYC
F. J. Berger, Detroit	"	20,255	GTW
R. G. Brown, Lowell	"	15,000	NYC
C. G. Cowan, Lansing	"	5,000	NYC
L. B. Dohse, Niles	"	17,500	NYC
H. C. Gayton, Harper Woods	"	3,200	GTW
L. A. Gill, Royal Oak	"	10,000	NYC
R. W. Gregory, Inkster	"	50,000	NYC
R. F. Lowe, River Rouge	"	7,000	NYC
J. A. Lustig, Inkster	"	3,500	NYC
J. M. Markiewicz, Dearborn	"	7,350	NYC
C. L. Marx, Jackson	"	35,000	NYC
L. R. Selby, Battle Creek	"	(Dismissed)	GTW
J. A. Sheridan, Detroit	"	3,500	NYC
C. S. Slater, Dearborn	"	18,000	DT&I
R. L. Smith, Niles	"	19,500	NYC
Michael Spelich, Niles	"	22,500	B&O
V. H. Steele, Niles	"	1,750	NYC
Harry Van Wagner, Jackson	"	1,500	NYC
Arthur Zink, Port Huron	"	20,000	GTW
J. A. Prestine, Niles	Metzenbaum, Schwartz & Disbro, Cleveland & L. S. Karlin, Chicago	6,979	NYC
Spencer Cook, Detroit	Smith & Munson, Chicago	900	Wab
CASE HANDLED IN INDIANA			
Floyd Brown, Flint	Justin Waitkus, Gary	(Def't)	B&O
CASE HANDLED IN MINNESOTA			
L. N. Mattonen, Escanaba	Davis, Rerat, Yaeger & Lush Minneapolis	15,000	C&NW
CASES HANDLED IN OHIO			
E. C. Duty, Monroe	Harrison, Spangenberg & Hull. Cleveland	7,000	NYC
Z. Newman, Jr., Ludington	J. H. Traverse, Cleveland	60,000	C&O
CASES HANDLED IN PENNSYLVANIA			
Charley Carr, Detroit	Meyer, Lasch, etc., Philadelphia	3,000	NYC
L. A. White, Jackson	"	8,500	NYC

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1957 TO DECEMBER 31, 1957 (continued)

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	36	$472,210
Cases handled by Henslee firm	22	283,305
Cases handled by other attorneys	10	133,754
Totals	68	$889,269

(Plaintiff's Exhibit 11 Omitted in Printing.)

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PLAINTIFF'S EXHIBIT 12

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1958 TO DECEMBER 31, 1958

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
L. R. Burch, Detroit	Bernstein & Bernstein, Detroit	$ 1,393	C&O
C. D. Loucks, Jackson	G. R. Campbell, Jackson	12,500	NYC
D. J. Clift, Battle Creek	R. W. Conroy, Battle Creek	1,800	GTW
Lonnie Nance, Baldwin	W. A. George, Baldwin	500	C&O
W. H. Deford, Saginaw	Heilman & Purcell, Saginaw	16,000	C&O
J. R. Draper, Detroit	Marcus, Kelman, etc., Detroit	(Dismissed)	NYC
M. M. Brown, Dearborn	L. M. Marko, Detroit	10,000	NYC
R. E. Chubb, Ypsilanti	"	12,500	NYC
L. A. Gouine, Warren	"	750	NYC
E. J. Kroll, Wyandotte	"	7,490	NYC
Kenneth McCobb, Detroit	"	72,500	NYC
R. J. Rebant, Detroit	"	500	NYC
R. E. Rebant, Detroit	"	1,500	NYC
E. J. Riley, Ann Arbor	"	2,475	NYC
M. M. Riskey, Traverse City	"	8,000	C&O
M. M. White, Bay City	"	2,000	NYC
Welby Erskine, Jr., Saginaw	Martin & Martin, Saginaw	35,000	AT&SF
Stanley Isadore, Detroit	Rapaport, Siegrist & Maitech, Detroit	7,500	GTW
R. B. Foust Jr., Lansing	E. H. Schink, Detroit	1,500	NYC
G. V. Mackey, Detroit	"	2,750	NYC
E. H. Morris, Detroit	"	10,000	NYC
W. H. Raines, Detroit	"	6,000	GTW
G. E. Rockeman, Detroit	"	4,500	NYC
H. L. Sonerant, Detroit	"	5,500	NYC
D. J. Trombley, Armada	"	1,000	NYC
D. J. Trombley, Armada	"	7,500	NYC
D. R. Williams, Detroit	"	8,000	NYC
R. J. Wilson, Detroit	"	6,000	GTW
CASES HANDLED IN ILLINOIS			
J. S. Kline, Saginaw	L. G. Davidson, Chicago	40,000	C&O
M. G. Huntington, Mendon	J. A. Dooley, Chicago & E. J. Ryan, Kalamazoo	500	NYC
Clayton Bryant, Monroe	B. E. Heirich, Chicago	35,000	NYC
W. W. Trommer, Detroit	"	10,000	NYC
W. W. Trommer, Detroit	"	6,000	NYC
E. D. Brown, Detroit	Henslee, Monek & Murray, Chicago	22,000	NYC
Irving Dobson, Ferndale	"	(Def't)	GTW
C. J. Draggoo, Osseo	"	16,000	NYC
Willard Durham, Battle Creek	"	5,000	NYC
J. A. Montagano, Detroit	"	1,600	NYC
A. M. Sumkowski, Jackson	"	1,350	NYC
R. E. Joseph, Horton	"	1,500	NYC

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1958 TO DECEMBER 31, 1958 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASE HANDLED IN INDIANA			
Floyd Brown, Flint	Justin Waitkus, Gary	(Def't)	B&O
CASES HANDLED IN MINNESOTA			
L. B. Vesel, Engadine	Vennum. Newhall & Goetz, Mpls.	$ 4,000	Soo
H. L. Houle, Menominee	Yaeger, Austin & Chapman, Mpls.	22,600	C&NW
H. A. Lehman, Menominee	"	47,500	CMStP&P
CASE HANDLED IN NEW YORK			
Jasper Bright, Dowagiac	Delson, Levin & Gordon, N.Y. City	2,250	NYC
CASES HANDLED IN OHIO			
E. M. Cool, Tecumseh	Brady, Whitehead & Simmons, Toledo	4,875	B&O
R. G. Young, Temperance	C. H. Brady, Toledo	5,000	D&TSL
G. S. Anson, Monroe	Cubbin & Rice, Toledo	825	D&TSL
B. A. Rice, Detroit	Dombey, Tyler, Richards & Grieser, Columbus	16,500	Pa
CASES HANDLED IN PENNSYLVANIA			
D. C. Bass, Jackson	Meyer, Lasch, Hankin & Poul, Phila.	4,500	NYC
F. W. Slighly, Grass Lake	"	10,000	NYC
Paul L. Young, Niles	"	17,500	NYC

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	28	$255,158
Cases handled by Henslee firm	7	117,450
Cases handled by other attorneys	17	227,050
Totals	52	$599,658

(Plaintiff's Exhibit 13 Omitted in Printing.)

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PLAINTIFF'S EXHIBIT 14

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1959 TO DECEMBER 31, 1959

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
W. D. Boudro, Durand	Cincinnelli & Brisbois, Saginaw	$25,000	GTW
Joseph Cachia, Detroit	M. A. Guest, Detroit	3,510	NYC
Dewey Franks, Detroit	V. G. Hanson, Detroit	1,000	GTW
Lester McGuire, Detroit	Marcus, Kelman, etc., Detroit	3,250	NYC
L. O. Sink, Battle Creek	J. A. Markle, Detroit and J. M. Allen, Battle Creek	13,000	GTW
W. F. Berjski, Detroit	L. M. Marko, Detroit	12.500	NYC
W. P. Bilokury, Inkster	"	17,500	NYC
W. E. Elliott, Saginaw	"	2,500	C&O
C. D. Hensley, Detroit	"	500	GTW
R. F. Kall, East Detroit	"	1,550	NYC
Henry Kosmala, Van Dyke	"	3,500	NYC
Peter Molter, G. P. Woods	"	5,000	NYC
B. A. Nickerson, Allen Park	"	1,750	NYC
J. K. Stringer, Trenton	"	250	NYC
S. J. Drake, Sr., Detroit	McDonald & Kane, Detroit	4,750	NYC
Gerritt Hoffman, Saginaw	John Purcell, Saginaw	30,000	C&O
E. E. King, Saginaw	"	7,500	GTW
N. H. Murray, Saginaw	"	(Def't)	C&O
Chas. Norrick, Detroit	T. J. Rafferty & Alexander Cholette, etc., Detroit	48,500	C&O
Aaron Johnson, Detroit	Rothe, Marston, etc., Detroit	21,100	NYC
T. D. Naughton, Dearborn	F. T. Schermerhorn, Detroit	580	NYC
Thos. Alderman, Jr., Detroit	E. H. Schink, Detroit	10,000	NYC
Thos. Alderman, Jr., Detroit	"	3,500	NYC
L. C. Anderson, Van Dyke	"	3,600	GTW
P. M. Arrieta, Stockbridge	"	2,000	NYC
P. M. Arrieta, Stockbridge	"	2,000	NYC
P. H. Jackson, Detroit	"	13,500	NYC
C. R. Langzell, Detroit	"	(Dismissed)	GTW
Albert Salinger, Detroit	"	1,600	NYC
Emil Tkaczuk, Detroit	"	300	GTW
F. L. Wilson, Madison Heights	"	25,000	GTW
A. E. McClure, Marne	Abel, Selburn, Detroit & B. E. Heirich, Chicago	5,000	C&O
CASES HANDLED IN ILLINOIS			
J. B. Nichols, Jr., Detroit	Epstein, Wilsey & Kirsh, Chicago	200	NYC
T. L. Adams, Lansing	Henslee & Henslee, Chicago	6,700	NYC
W. E. Bray, Livonia	"	16,000	C&O
A. W. Broome, Detroit	"	5,000	Wab
R. S. Guilfoil, Jackson	"	8,000	NYC
R. L. Henning, Niles	"	30,000	NYC

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1959 TO DECEMBER 31, 1959 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN ILLINOIS (continued)			
C. R. Hornbeck, Gibraltar	Henslee, Monek & Murray, Chicago	$50,000	DT&I
Delbert Keith, Saginaw	"	4,200	C&O
Irving C. Lucas, Flint	"	2,500	C&O
D. A. McDonald, Detroit	"	30,000	Wab
G. F. Mueller, Pontiac	"	3,750	GTW
D. G. Patty, Vandercook Lake	"	1,500	NYC
J. P. Persak, Grand Rapids	"	15,400	Pa
J. F. Smith, Drayton Plains	"	275	GTW
Leslie Smith, Battle Creek	"	27,000	GTW
Leslie Smith, Battle Creek	"	500	GTW
J. W. Staley, Flint	"	20,000	GTW
R. E. Winebrenner, Edwardsburg	"	8,500	NYC
John Tracey, Detroit	"	12,000	NYC
E. H. Wandrey, Niles	"	5,000	NYC
E. H. Wandrey, Niles	"	5,000	NYC
W. F. Copper, Jackson	E. H. Schink, Detroit	17,500	NYC
CASES HANDLED IN MINNESOTA			
J. R. Flannery, Gladstone	Rerat & Brady, Minneapolis	16,300	Soo
L. K. Baillargeon, Escanaba	Yaeger, Austin & Chapman, Mpls.	14,500	C&NW
CASES HANDLED IN OHIO			
Carl Blank, LaSalle	Brady & Simmons, Toledo	2,175	D&TSL
J. A. Roberts, Monroe	C. H. Brady, Toledo	50,000	D&TSL
J. D. Scott, Osseo	Metzenbaum & Schwartz, Clev.	5,000	NYC&StL

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	32	$282,240
Cases handled by Henslee firm	20	251,325
Cases handled by other attorneys	7	93,175
Total	59	$626,740

(Plaintiff's Exhibit 15 Omitted in Printing.)

[~~443~~]

PLAINTIFF'S EXHIBIT 16

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1960 TO DECEMBER 31, 1960

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
CASES HANDLED IN MICHIGAN			
R. J. Turner, Detroit	J. R. Bacalis, Detroit	$ 1,000	Wab
C. O. Gable, Battle Creek	Russell Conroy, Battle Creek & M. E. LeSueur, Chicago	44,000	NYC
R. G. Faulhaber, Southgate	Goodman, Crockett, etc., Detroit	5,300	C&O
Frank Bradford, Flint	Benzion, Gotlib, Flint	(Dismissed)	GTW
E. L. Murphy, Lincoln Park	Kelly, Kelly & Kelly, Jackson	22,500	Wab
Emmett Gatson, Detroit	Lampert, Fried & Kanner, Detroit	2,500	NYC
Richard Acton	L. M. Marko and Goodman, Crockett, Eden & Robb, Detroit	99,500	C&O
D. M. Blake, Ferndale	L. M. Marko, Detroit	400	NYC
J. E. Boyd, Detroit	"	1,600	NYC
W. T. Brafford, Rockwood	"	23,000	DT&I
Zigmund Danielak, Detroit	"	13,000	NYC
W. E. DeWitt, Traverse City	"	12,000	C&O
A. J. Gilleran, Detroit	"	12,500	NYC
W. M. Henry, Port Huron	"	2,500	GTW
L. S. Lucas, Detroit	"	2,750	NYC
H. C. Seden, Northville	"	750	NYC
F. K. Szostak, Detroit	"	185	NYC
R. B. Delgado, Dearborn	Menendez & LaPlata, Detroit	1,000	NYC
Arnold Smith, Highland Park	E. H. Schink, Detroit	420	NYC
Eddie McGhee, Grand Rapids	Williams & Damon, Grand Rapids	1,500	C&O
E. L. Peale, Maybee	Williamson & Williamson, Monroe	16,725	Wab
CASES HANDLED IN ILLINOIS			
D. J. Demeuse, Escanaba	N. Chapekis, Escanaba and M. H. Lyons, Chicago	28,500	C&NW
C. W. Thomas, Goodells	B. E. Heirich, Chicago	20,000	GTW
J. L. Young, Port Huron	B. E. Heirich, Chicago	16,500	GTW
R. A. Barnett, Pontiac	Henslee & Henslee, Chicago	1,000	GTW
P. W. Bauner, Niles	"	47,000	NYC
J. W. Clark, Lansing	"	2,500	NYC
Joe Esra, Oak Park	"	2,000	GTW
H. K. Stoddard, Michigan Center	"	35,000	NYC
A. F. Taylor, Lansing	"	9,500	NYC
M. V. Worden, Grand Rapids	Parlin & Karlin, Chicago	25,000	Pa
CASES HANDLED IN MINNESOTA			
R. C. Ziem, Ironwood	Yaeger & Yaeger, Minneapolis	7,500	C&NW

SETTLEMENTS IN
F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JANUARY 1, 1960 TO DECEMBER 31, 1960 (continued)

Plaintiff or Claimant	Attorney	Amount Paid	Railroad
	CASE HANDLED IN OHIO		
E. A. Thompson, Niles	Dworken & Dworken, Cleveland	$49,000	NYC
	CASE HANDLED IN PENNSYLVANIA		
Callie McBride, Detroit	Meyer, Lasch, Hankin & Poul, Philadelphia	22,000	NYC

SUMMARY

	Number	Amount
Cases handled by Michigan attorneys	20	$219,130
Cases handled by Henslee firm	6	97,000
Cases handled by other attorneys	8	[illegible]500
Total	34	[illegible]630

PLAINTIFF'S EXHIBIT 17

SETTLEMENTS IN F.E.L.A. CASES INVOLVING MICHIGAN RESIDENTS REPORTED TO CLAIMS RESEARCH BUREAU DURING THE PERIOD JULY 1, 1953 TO TO DECEMBER 31, 1960

Reporting Period	Cases Handled by: Michigan Attorneys Number	Michigan Attorneys Amount	Henslee Firm Number	Henslee Firm Amount	Other Attorneys Number	Other Attorneys Amount	TOTAL Number	TOTAL Amount
July 1, 1953 to March 31, 1955	38	$ 371,720	126	$1,191,064	33	$ 503,349	197	$2,066,133
April 1, 1955 to Dec. 31, 1955	12	86,850	22	249,625	6	57,900	40	394,375
Year 1956	14	78,225	15	162,700	3	11,750	32	252,675
Year 1957	36	472,210	22	283,305	10	133,754	68	889,269
Year 1958	28	255,158	7	117,450	17	227,050	52	599,658
Year 1959	32	282,240	20	251,325	7	93,175	59	626,740
Year 1960	20	219,130	6	97,000	8	212,500	34	528,630
	180	$1,765,533	218	$2,352,469	84	$1,239,478	482	$5,357,480

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PLAINTIFF'S EXHIBIT 19

DIRECTORY

of the

GRAND LODGE and
SUBORDINATE LODGES

of the

BROTHERHOOD OF RAILROAD
TRAINMEN

JANUARY, 1959

ISSUED JANUARY, APRIL, JULY AND OCTOBER

MICHIGAN

Location and Number of Lodges

Alpena	568	Gladstone	103
Battle Creek	265	Grand Rapids	180
Battle Creek	782	Grand Rapids	1,070
Bay City	147	Ironwood	638
Detroit	149	Jackson	121
Detroit	269	Kalamazoo	1,027
Detroit	454	Lansing	1,078
Detroit	555	Ludington	1,064
Detroit	636	Marquette	10
Detroit	749	Marquette	612
Detroit	1,067	New Buffalo	1,071
Durand	784	Niles	262
Erie	1,068	Niles	1,012
Escanaba	182	Owosso	786
Escanaba	1,098	Pontiac	1,033
Flat Rock	716	Port Huron	241
Flint	1,048	Saginaw	188
Flint	1,066	Saginaw	1,065

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IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON

THE STATE BAR OF MICHIGAN,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

No. T—640

REMITTITUR FROM SUPREME COURT
TO LOWER COURT

(Filed January 22, 1965)

(State of Michigan—Supreme Court)

Before: The Entire Bench; Black, J.

Plaintiff's bill was filed January 28, 1959, in the Jackson circuit. It was designed to obtain relief corresponding to that which was sought about the same time by the Virginia State Bar, against the same defendant Brotherhood, in the Chancery Court of Richmond, Virginia. For the history of the Virginia Case, and for understanding of its ultimately controlling effect here, we refer to *Brotherhood of Railroad Trainmen v. Virginia* ex rel. Virginia State Bar, ... US ...., 12 L ed 2d 89, 84 S Ct ...., decided April 20, 1964.

The Jackson County Circuit Court ruled in favor of the plaintiff State Bar, finding as applicable certain then unreversed and apparently controlling Lower Court decisions. The Circuit Court concluded:

> "This same matter has been before the Courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states,

in one form or another, have approved the decisions of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel*

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"This Court feels that the plaintiff is entitled to relief."

Decree below, entered under date of September 14, 1962, enjoining the defendants in much the same manner as was done by the Chancery Court of Richmond. The defendants having appealed from such decree, and it appearing that submission to the Supreme Court of the Virginia Case was then imminent, ordered entered here January 2, 1964, as follows:

"On reading and filing appellants' December 26 motion for continuance, and upon consideration of the summary appearing in 32 LW 3006 pertaining to like questions that are due for January argument in the case identified below;

"It is ordered that submission of this cause on appeal be and the same is hereby continued pending final determination, by the Supreme Court of the United States, of the case of Railroad Trainmen v. Virginia State Bar, Docket 34, certiorari granted 9 L ed 2d No. 7, p 715.

"It is further ordered that appellants' motion for certification of this cause, to the Supreme Court, be and the same is denied."

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* The Virginia Case, to which the circuit court referred, was of course the decision which per foregoing citation was reviewed and reversed by the Supreme Court.

Now that the Supreme Court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.

Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion.

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IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON

THE STATE BAR OF MICHIGAN,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

No. T—640

MOTION FOR FURTHER PROCEEDINGS IN CIRCUIT COURT ON REMAND FROM SUPREME COURT OF THE STATE OF MICHIGAN

(Circuit Court For The County of Jackson)

(Filed January 20, 1965)

Now come the attorneys for the State Bar of Michigan, Plaintiff, and show unto the Court as follows:

1. That an opinion has been entered in the Supreme Court of the State of Michigan, on appeal of the above matter from the decree of the Circuit Court for the County

of Jackson, in which Supreme Court opinion, the Supreme Court has reversed the decree of the Circuit Court for the County of Jackson and remanded the case for further proceedings in the Circuit Court for the County of Jackson.

Wherefore, the State Bar of Michaigan, Plaintiff, by its attorneys prays that further proceedings in this cause be noticed in accordance with said remand.

State Bar of Michigan,

/s/ J. Cameron Halls,
Phillip C. Kelly,

Counsel for State Bar of Michigan
1323 Dime Building,
Detroit, Michigan 48226.
(313) 961-4167
210 W. Franklin St.,
Jackson, Michigan.
(517) 782-7174

[451] (Jurat omitted in printing)

* * * * *

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OPINION AND ORDER

(Filed May 24, 1968)

(Circuit Court For The County of Jackson)

Pursuant to the directive of the Supreme Court of this state in the case of *State Bar of Michigan v. Brotherhood of Railroad Trainmen,* 374 Michigan, 152, 155, this matter was noticed for hearing before this Court for entry of an order not inconsistent with the United States Supreme Court opinion in *Railroad Trainmen v. Virginia Bar,* 377 U. S. 1, 12 L ed 2d, 89.

Motion for judgment in accordance with the foregoing was argued before this Court by both counsel on May 17, 1968.

Subsequent to entry of the United States Supreme Court decision aforesaid, this matter once again came before the Supreme Court of the State of Virginia on June 13, 1966, (rehearing denied September 14, 1966) and upon which case certiorari to the United States Supreme Court has also been denied, wherein the said Supreme Court of the State of Virginia made its determination of what would be a proper order under the mandate of the United States Supreme Court. **

Upon argument before the Court, considerable stress was laid upon the holding of the United States Supreme Court in *United Mine Workers v. Illinois Bar Association*, 19 L ed 2d, 426, wherein it was held that the First and Fourteenth Amendments gave the mine workers the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

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As pointed out in the footnotes on page 428, the opinion and holding was limited to this one aspect of the union's activities.

It must also be kept in mind that the same general principle; that is, actual payment of the attorneys by the association involved, had been before the United States Supreme Court in the case of *NAACP v. Button*, 371 U. S., 415, 9 L ed 2d, 405.

There is nothing in the *United Mine Workers Case* which would permit or change entry of the proposed order which is in conformity with the interpretation of the Supreme Court mandate as made by the Virginia Supreme Court.

Also before this Court were two motions to dismiss as to individually-named, defendants, with the exception of L. M. Hasbrouck, Raymond Fieberkorn, and R. J. Johnson.

Said motions to dismiss are hereby granted, and it is so ordered.

For the reason that this is a class action and that there are only the above three named individual defendants remaining in this matter, this Court hereby, *sua sponte*, orders this matter dismissed as to the remaining three also.

So there will be no misunderstanding, the remaining defendants herein are The Brotherhood of Railroad Trainmen and all members, agents and officers of The Brotherhood of Railroad Trainmen in the State of Michigan.

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Counsel for plaintiff is hereby directed to redraft the proposed judgment submitted to this Court, omitting from the title thereof the individually-named defendants against whom this action has now been dismissed, and present said corrected judgment forthwith to this Court for signature.

It is so orderd.

/s/ John C. Dalton,
Circuit Judge.

**Addendum:

The 1966 Virginia case above referred to is *Brotherhood of Railroad Trainmen v. Commonwealth*, 207 Virginia, 182; 149 SE 2d, 265.

Dated: May 24, 1968.

JUDGMENT

(Circuit Court For The County of Jackson)

At a session of said Court held in the Circuit Court Room, County Building, Jackson, Michigan, this 27th day of May, 1968,

Present: Honorable John C. Dalton, Circuit Judge.

This Court having heretofore and on the 14th day of September, 1962, entered its decree in favor of plaintiff and against defendants in this cause and said decree having been appealed to the Supreme Court of Michigan and having been remanded to this Court for proceedings, not inconsistent with the decision of the United States Supreme Court in the case of *Commonwealth of Virginia ex rel Virginia State Bar v. Brotherhood of Rrailroad Trainmen,* [461]

and plaintiff having filed Motion to Enter Judgment, to which Motion a copy of said proposed judgment was attached and the court having heard the arguments of Counsel, and having duly considered said Motion and proposed judgment and being fully advised in the premises,

Therefore, on motion of counsel for plaintiff, it is ordered and adjudged that defendants herein be, and they are now permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such

injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise.

John C. Dalton,
Circuit Judge.

A true copy, Marie Lyons, Deputy Clerk.

* * * * *

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CLAIM OF APPEAL

(Filed June 13, 1968)

(Court of Appeals)

The Brotherhood of Railroad Trainmen, and all members, agents and officers of the Brotherhood of Railroad Trainmen of the State of Michigan, Defendants, Claim an Appeal from the Judgment of the Court entered in the Jackson County Circuit Court on May 27, 1968 by Hon. John C. Dalton, Jackson County Circuit Judge, in the case of *The State Bar of Michigan, Plaintiff, v. The Brotherhood of Railroad Trainmen,* and all members, agents and

officers of the Brotherhood of Railroad Trainmen of the State of Michigan, File No. T-640.

/s/ Walter M. Nelson,
Attorney for defendants-appellants,
1538 Dime Building,
Detroit, Michigan 48226.
WOodward 2-8351

Henslee, Monek & Henslee,
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Of counsel for defendants-appellants,
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Chicago, Illinois 60602.
782-5925

Dated: June 13, 1968.

* * * * *

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TRANSCRIPT OF PROCEEDINGS HAD ON FEBRUARY 5, 1965

(Filed October 4, 1968)

Before: Honorable John C. Dalton, Circuit Judge.

Appearances: Kelly, Kelly and Kelly, Esqs., by Philip C. Kelly, Esq., 210 West Franklin Street, Jackson, Michigan, for the plaintiff; John J. Naughton, Esq., 120 West Madison Street, Chicago, Illinois, for the defendants.

* * * * *

(3)

Jackson, Michigan,
Friday, February 5, 1965,
9:20 A.M.

Mr. Naughton: Your Honor, please, Mr. Walter M. Nelson is now my associate counsel in this case, but he does not appear to have arrived. He is coming here from Detroit.

Shall we proceed without him?

The Court: Well, if you think he will be here shortly, why, I think we ought to give him reasonable time. There may be some reason why he has been delayed.

I do not want to proceed without him.

Mr. Naughton: Your Honor, please, I believe all he will do is introduce me. I am willing to do the entire speaking without him taking any active participation in any of it.

The Court: All right, then. Let us proceed.

Mr. Kelly: We have a motion before the Court this morning, your Honor, pursuant to the opinion of the Michigan Supreme Court.

The Court: Mr. Kelly, I do not care to interrupt you, but just one moment.

Mr. Kelly: The motion is under the—

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(4) The Court: I beg your pardon.

This is a motion for further proceedings pursuant to the opinion rendered in the Supreme Court recently, is that it?

Mr. Kelly: That is correct, your Honor, remanding it to this Court for further proceedings not inconsistent with the United States Supreme Court opinion in the Virginia case.

The Michigan Supreme Court opinion included this language: "—we remand with permission for amendment of

plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

Mr. Hall, General Counsel for the State Bar, is out of the state this week, but we have conferred concerning the present status of the case and thought the proper way to bring this back before the Court was by this general motion.

It is my belief—I think Mr. Hall concurs in it—that the plaintiff does not care to amend the complaint; but we are informed that the Trial Court in the Virginia case has filed an opinion and entered an amended decree pursuant to the remand from the United States Supreme Court in that case.

I believe that the plaintiff or State Bar of (5) Michigan will, with leave of the Court, for which we pray, present this Court a further brief directed to the revision of the decree of this Court on terms not inconsistent with the United States Supreme Court opinion in the Virginia Case.

I do not know what the defendant may wish to do, but that is the position of the State Bar on the present status of the proceedings. We would like, in other words to submit a memorandum brief to this Court directed to the method of revising the decree which this Court has entered.

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The Court: Mr. Naughton.

Mr. Naughton: May it please the Court, since this case was last before it, this Court, the Court wrote an opinion, and in that opinion it stated correctly and perhaps with prophecy that the nub of the proceedings here was the recommendation of counsel by members of the Brotherhood of Railroad Trainmen.

Subsequently the Supreme Court of the United States has entered a decree in *Brotherhood of Railroad Trainmen v. The State Bar of Virginia.* In that opinion the Supreme Court of the United States squarely holds that the plan of the Brotherhood of Railroad Trainmen is protected by rights guaranteed by the First Amendment to the Constitution of the United States, specifically being (6) the rights of freedom of speech and freedom of association.

Now this cause has been remanded to this Court by the Supreme Court of Michigan for proceedings not inconsistent with the opinion of the Supreme Court of the United States.

As counsel has pointed out, the Supreme Court of Michigan has specifically granted permission for amendment of plaintiff's bill of complaint. This is an indication as to the thinking of the Supreme Court of Michigan, that an amendment of the bill of particulars is necessary in order that any relief be granted.

It, of course, is the position here of the Brotherhood of Railroad Trainmen that the present bill is based almost exclusively on the allegations taken from findings in the Illinois Supreme Court decision and is relying primarily for relief upon the statute of the State of Michigan dealing with solicitation, a statute which under the opinion of the Supreme Court of the United States must be held to be invalid as applied to the trainmen just as similar statutes

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in the State of Virginia were held invalid as applied to the National Association for the Advancement of Colored People in *NAACP v. Button.*

When that case was decided the relief granted there flowed over into the *Brotherhood* Case, so when the (7)

State Bar of Virginia came before the Supreme Court they did not rely upon the statute at all.

It seems to me that the State Bar of Michigan is in the same position here. If it seeks relief in this case, it must rely on the statute.

In any event, it seems to me that before further pleadings, before further briefing can be had in this case, that the purpose of pleadings should be required; that is, that there should be a framing of the issues so we know what we are discussing in this case.

Now, as to the pleadings filed on behalf of the Brotherhood of Railroad Trainmen, the situation is that we are now talking about this case in 1965 on pleadings filed in 1959.

The voice of the injunction has to speak as of the time in which it is issued. To ask for an injunction here with a six-year gap and with an intervening opinion by the Supreme Court of the United States in which constitutional rights of my client have been established and confirmed, it seems to me is not a proper proceedings, and that request should be denied.

In any event, in this long interim, I would like to suggest to the Court that the defendants here are no longer officers of the trainmen to a great extent. (8) H. F. McCall is dead. I would suggest his death is of record. Other defendants, Frank Carr, L. E. Singer, R. J. Snow, and W. C. Roryell, are retired from employment and retired from the brotherhood; W. T. Ellsworth is retired from railroad employment and is now a nonresident of the State

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of Michigan residing in Bradenton, Florida; and W. E. B. Chase is no longer a resident of Michigan, having become

a citizen of the State of Ohio. He is now general secretary-treasurer of the International Organization of the Brotherhood of Railroad Trainmen.

In all the circumstances, I feel that, if the State Bar refuses to amend, this cause should be dismissed at this time.

Thank you, your Honor.

Mr. Kelly: The Court is cognizant of the fact that this is a class action; so it is expressly stated in this bill of complaint. If the officers change, that does not oust the Court of jurisdiction on the decree as entered by this Court and which is a subject of revision under the decision of the Supreme Court of this state.

I do not say to the Court here this morning that the State Bar will not or might not amend its complaint if that should appear necessary or proper in the course of the proceedings.

(9) At the present time, it is the mind of the State Bar, through its counsel, that the record in this case as made will support a decree granting relief to the State Bar in somewhat altered terms, perhaps, than those of the existing decree and not inconsistent with the United States Supreme Court opinion in the Virginia case.

We wish to present our views on the matter to the Court at this time by way of a brief, and it may be that some further proceedings may follow the submission of the brief or may accompany the brief.

The matter—I think all parties recognize—is not one in the usual course of litigation in this or any other court and requires some study as to the future course of litigation to a degree, and all we ask is that permission, a reasonable time to present our views to the Court.

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The Court: I do not believe it is anything that the Court should decide off the cuff here this morning, that is for sure.

I wish counsel would present their respective positions to me in a memorandum brief.

Mr. Kelly, of the State Bar, of course, will file their brief first.

Can you have it filed in what,—

Mr. Kelly: (Interrupting) Mr. Hall—

(10) The Court: (Continuing) twenty days? Twenty days.

If you have no objection to thirty days, we will give counsel the same time.

Any objection, Mr. Naughton?

Mr. Naughton: To the time schedule?

The Court: Yes.

Mr. Naughton: No, your Honor.

The Court: Well then, the State Bar of Michigan will file their memorandum brief within twenty days and the—

Mr. Kelly: Just a minute, your Honor. May I interrupt?

The Court: I mean thirty days.

Mr. Kelly: I was going to say that it is necessary for me to work with Mr. Hall on this matter. I am going to be out of the state next week. He is out of the state now. There may be some difficulty in meeting a thirty-day schedule in a matter of this kind, and I would like to be able to reserve at least tentatively the right to ask for a further extension if it becomes necessary.

I will assure the Court that counsel for the State Bar will proceed as promptly as possible.

The Court: Well, let us cross that bridge when (11) we get to it.

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Mr. Kelly: Yes. All right.

The Court: In the event there is any extension, why, defendants' counsel will be extended the same courtesy.

Mr. Naughton: Thank you, your Honor.

The Court: So for the time being, let the record show that this matter will stand continued on a day-to-day basis pending the submission of briefs by counsel presenting their respective positions; and, after defendants have filed their brief, if in the event a reply is desired to be made by plaintiff, then I think, ten days should be sufficient for that.

I think we have covered the time schedule pretty well here. And I think at this time, also—I believe I have the right, anyway, but so there will be no misunderstanding about it—after the Court receives the briefs, it reserves the right to notify counsel to appear for oral argument.

Mr. Naughton: If your Honor please, any later oral argument that you have, can it be set in an afternoon setting, because it is relatively inconvenient for Mr. Nelson to get here? He is approximately eighty years old, and I know he has difficulty driving.

(12) The Court: Yes. We often do that to accommodate out-of-town counsel. We can arrange that.

[477] (Certificate of Court Reporter omitted in printing.)

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TRANSCRIPT OF PROCEEDINGS HAD ON MAY 3, 1968

(14) Before: Honorable John C. Dalton, Circuit Judge.

Appearances: Kelly, Kelly and Kelly, Esqs., by Phillip C. Kelly, Esq., 210 West Franklin Street, Jackson, Michigan, for the plaintiff; Walter M. Nelson, Esq., 1538 Dime Building, Detroit, Michigan, and (15) John J. Naughton, Esq., 120 Madison Street, Chicago, Illinois, of counsel, for the defendants.

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Jackson, Michigan,
Friday, May 3, 1968,
11:02 A.M.

The Court: Mr. Kelly.

Mr. Kelly: May it please the Court—

Mr. Naughton: Your Honor please, is the reporter present.

The Court: Pardon?

Mr. Naughton: Is the reporter present?

The Court: Yes.

Mr. Naughton: I thought it was the clerk.

The Court: No, no.

Mr. Naughton Before we begin on the motion, I have a motion which I filed in 1965 to dismiss parties defendant. I would think, your Honor, that that should be disposed of first.

The Court: This is the motion that we held in abeyance pending the opinion, is that correct?

Mr. Naughton: No. I think it was another motion we held in abeyance pending the opinion, which was a motion

to put the 1965, I believe, decree in Virginia in effect here in Michigan. So far as I know, no motion to stay considering this motion was ever made.

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(17) Mr. Kelly: I would like for the purpose of the record, if the Court please, to present the motion which is duly noticed for this morning for consideration and determination by the Court.

I have no independent recollection of the motion which Mr. Naughton refers to. I have not had time to check the file this morning.

If there is a motion before the Court and it is in order to be considered by the Court, I would have no objection, of course, to that prior to this judgment going into effect. As I understand it, only the number of defendants whom this amended judgment would control. Or govern. Is that right, Mr. Naughton? In other words, you are asking them, certain defendants, to be dismissed.

Mr. Naughton: All said four defendants.

Mr. Kelly: Yes. Well, was that ever argued here or just filed?

Mr. Naughton: It was filed, yes; and I have seen nothing in opposition to it, because I don't believe there very well could be. It is taken from the records of The Brotherhood of Railroad Trainmen, the affidavit by the general secretary-treasurer in Cleveland, and that organization state, for example, that first gentleman who is on it here no longer resides in Michigan.

(18) Mr. Kelly: This file has become rather outsize over the period of time since it has been pending, and I certainly have no independent recollection of this motion. If

it was served on me, it is somewhere in my office. If I have not answered, I shall do so.

But we are here this morning on a duly-noticed motion. Counsel is here from out of the city and out of the state. I think it is practical to present it and have the Court take it under consideration with whatever preliminary consideration might be given to the motion of defendant which was referred to here this morning and which I am not prepared

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to answer. If I haven't answered it, I shall file an answer before expecting the Court to pass on the pending motion here. Rather than to adjourn this and have these counsel come back another time.

Mr. Naughton I am not requesting any adjournment, your Honor.

Mr. Kelly: All right.

The Court: The motion to dismiss was never noticed for hearing according to the file, Mr. Naughton.

Mr. Naughton: Yes, I understand that, your Honor; but I think that the filing of it plus the awaiting the further order of this Court would permit it to be brought up on the date which we would be present.

(19) Both Mr. Nelson and I are not from Jackson. It is a motion, I think, which has lately come, of course, and I see no particular demand that we notice it so shortly, your Honor.

Mr. Kelly: I never heard of a motion filed without being noticed.

The Court: Let's proceed with the other motion. There will be no action taken by the Court on the other motion this morning, pending disposition of the other motion. I

am talking about Mr. Naughton's motion to dismiss. It may be that Mr. Naughton's motion to dismiss will raise no problem. If it raises no problem, why, we haven't anything to be concerned about.

So let's proceed with your motion, Mr. Kelly.

Mr. Kelly: Might I say this on the record: that, as stated by the Court here, a motion filed some two or more years ago and never noticed is not before the Court properly and will not be before the Court in my opinion unless and until counsel wishes to notice it in due form, at which time if that should occur I will take such action an may be indicated.

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On the motion which is noticed for this morning for the Court to enter a judgment I am going to be as brief as the facts and circumstances may allow.

(20) As the record will show, this Court entered a decree on the 14th of September, 1962, in this matter; the decree being in favor of the the plaintiff and against the defendants following full trial and hearing before the Court, at which time both parties, all parties, were represented by counsel.

Following the entry of the decree, defendants appealed to the Supreme Court of Michigan. By the time the appeal was scheduled for hearing in the Supreme Court of Michigan, the United States Supreme Court had entered a judgment or a decision in a similar matter in which the issues were substantially similar to those in this case, because of which the Supreme Court of Michigan remanded this case back to this court for proceedings not inconsistent with the decision of the United States Supreme Court in the case

of *Commonwealth of Virginia* ex rel *Virginia State Bar against Brotherhood of Railroad Trainmen.*

Now, we had been awaiting the decision of the United States Supreme Court since that time, there having been further proceedings in the trial court and in the appellate court of the Commonwealth of Virginia, resulting in an amendment of their decree which went again to the United States Supreme Court on a petition for writ of certiorari by the Commonwealth of Virginia to amend the amended decree (21) of the court of Virginia, and which was denied by the United States Supreme Court some months ago. Some year or so ago, I believe.

That certiorari application and its denial was followed by an additional amendment of the Virginia decree which contained pertinent provisions which I have incorporated in the proposed judgment submitted to this Court and

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moved for signing by this Court; and I have attached to the plaintiff's motion the language of the Virginia decree, which I ask this Court to incorporate in the proposed judgment attached to our motion, and that language reads as follows:—and I am now reading from the Virginia decree so that the Court may, if he wished, follow the proposed judgment submitted by plaintiff here.

It states as follows. I quote:

> "The court doth adjudge, order, and decree that The Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, members and anyone acting in its behalf"—and this is language pertinent to the issue here—" be, and they now are, permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from in-

forming any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the (22) name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claims; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for

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personal injury or death by gift, assignment or otherwise."

We have in this motion and in this proposed judgment to the best of our ability and understanding of the decision of the Supreme Court of Michigan in remanding this case to this Court for proceedings not inconsistent with the United States Supreme Court in their case—we have followed that language word for word.

We move that the Court enter judgment in conformity and following that language as directed by the Supreme Court of this state.

(23) The Court: Mr. Naughton, are you going to make the argument?

Mr. Naughton: Yes, your Honor.

The Court: All right.

Mr. Naughton: If the Court please, and counsel, preliminary to discussing the motion which we agree is properly before this Court, we would like to point out that the notice goes only to the Chicago Office; that is to the firm with which I am associated, and wasn't sent to Mr. Nelson in Detroit. I feel that any further matters in this case should notice Mr. Nelson also.

Additionally and preparatorily also, the last time we were before you in 1965 I requested matters that would be brought before this Court would be brought in the late afternoon because of the difficulty of Mr. Nelson in getting to Jackson at nine-thirty in the morning, I think that that should certainly be done on any further proceeding.

Responding to the statement of facts, I would like to point out to the Court that the trial that was held in this matter was a trial solely of the plaintiff's evidence. At the conclusion of the plaintiff's evidence, the defendant had presented no evidence and waived its rights to present any.

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(24) Since that time the Supreme Court of Michigan has remanded this matter to this Court. In remanding to this Court, the Supreme Court of Michigan specifically pointed out in its opinion, in the last paragraph thereof: "—with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

They are referring to the opinion of the United States Supreme Court; where here in 1965 I suggested that there was nothing before this Court. There is no bill of com-

plaint. And that there should be a new one filed before the Court.

This being an equitable action, I think that the fact that no new bill has been filed is affirmatively shown by the record to constitute laches on the part of the State Bar of Michigan to proceeding to the matter before this Court.

I find it difficult to believe that the matter is being presented to this Court as though there weren't another case which is directly relevant to the institution of any decree in this area of free speech and freedom of assembly. That case is the case of *United Mine Workers of America v. Illinois Bar Association,* 389 U.S. 217; 88 Supreme Court 353; 19 Law Edition 2nd, 426, which (25) was handed down by the Supreme Court of the United States on December 5, 1967, some six months after the decree was entered in Virginia, a copy of which is presented to this Court today.

In a previous brief filed in this matter when the 1965 decree of Virginia was presented here, we pointed out that there was a substantially difference between the complaints originally filed in Virginia and the complaint filed here.

The gist of the complaint filed here, as your Honor has recognized in various orders entered in this proceeding,

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was a charge of solicitation against The Brotherhood of Railroad Trainmen.

In Virginia not only was the charge of solicitation raised but also the charge of unauthorized practice of law.

The *Mine Workers* Case deals substantially with these questions of unauthorized practice of law which, I respectfully submit to the Court, are the gist of the decretal provisions of the injunction presented here today. And that

opinion by Mr. Justice Black squarely eliminates from the consideration of this Court substantial portions of the decree submitted to it.

Before bringing to the attention of the Court (26) those provisions, it is important to point out the different factual context from which the *Mine Workers* Case arose as compared to the *Trainmen's* Case.

As your Honor will recall, the *Trainmen's* Case, the Brotherhood plan was a plan of independent regional counsel to enter into a lawyer-client relationship with the members by virtue of the trainmen's attempt to get these individuals together; that is, both lawyer and client, in the interest of seeing that adequate compensation under the Federal Employer's Liability Act was provided to its members.

In the *Mine Workers* Case, the mine workers' attorney is on salary. Every individual of the Mine Workers is entitled to have his compensation case processed by the mine-worker attorney without any fee being charged. Moreover, factually, the attorney and the client never see each other unless the original proceeding before the compensation commission results in a dispute, requiring that a hearing be conducted. The way this is handled, according to the testimony of the *Mine Workers* Case, is that the attorney gets a form and, although the form doesn't show that the claimant wishes to retain an attorney and doesn't mention

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the attorney's name, it is presumed by the attorney that the mere fact that he fills out this form (27) which, basically, contains only the facts of his injury, is, as I say, presumed to indicate that he intends to enter into a lawyer-client relationship with the attorney.

The Illinois Supreme Court, when the position was presented to it, enjoined the Mine Workers, as had the Circuit Court of Sangamon County in the State of Illinois. Upon appeal to the United States Supreme Court, it was, as I have said, reversed.

With particular pertinence, the court states that the Supreme Court of Illinois' attempted distinction of *Railroad Trainmen v. Virginia Bar* and of *NAACP v. Button* was inept. Mr. Justice Black specifically states: "We do not think our decisions in Trainmen and Button can be so narrowly limited."

Now, directing your Honor's attention to the first provision of the decree, which is "—from giving or furnishing legal advice to its members or their families," as I have argued on behalf of the *Trainmen* before, there is absolutely no evidence, no claim in this case, that any such advice was given or furnished to their families, absent the advice that they should get the union lawyer.

I do not think that this is giving or furnishing legal advice, but assuming without conceding that it is the giving or furnishing of legal advice, the *Mine Workers* (28) Case is clearly the giving of legal advice. It is clearly creating a situation where there is no possibility as a practical matter that any other than a mine worker attorney will handle a mine worker's compensation claim.

The second provision of the decree: "—from informing any lawyer or lawyers that an accident has been suffered by a member or non-member and furnishing the name and address of such injured or deceased person for the pur-

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pose of obtaining legal employment for any lawyer," is, we suggest, too vague for enforcement in this ticklish area

of freedom of speech and freedom of assembly. It is unconstitutionally vague as Mr. Justice Brennan stated in *NAACP v. Button*. Precision is the touchstone in this area. There is no precision in that phrase.

Moreover, this matter was taken from an approval thereof by the Virginia Supreme Court of Appeals when it reversed the 1965 Virginia decree. There the court had said that this provision was being consistent because it related solely to any circumstances where the Brotherhood was using this method of encouraging and aiding the solicitation of legal advice by a lawyer who personally was doing the soliciting. This phrase, while glossed on the Virginia decision, isn't glossed here.

The second, the one following that, "—from (29) stating or suggesting defraying of expenses," is something that has nothing to do with the Brotherhood plan. It never had anything to do with the Brotherhood plan. If there is any defraying of expenses by any Brotherhood counsel, it is in accordance with local law and solely his decision and not part of the Brotherhood plan. This is extremely important because only the Brotherhood itself and Brotherhood officers are here defendants in this cause.

Now, the next one, "—from controlling, directly or indirectly, the fees," has been obliterated in this area of freedom of speech by the *Mine Workers* decision; and specifically, the United States Supreme Court, through Mr. Justice Black, states: "Since the operative portion of the *Mine Workers* decree prohibits any financial connection between the attorney and the Union, the decree cannot stand." This is identical.

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Now, of course, we submit that we are in compliance with the Illinois decree, that our client operates along those

lines; that so far as anyone knows this is the way it will operate in the future. But nevertheless the fact remains, if The Brotherhood of Railroad Trainmen want to change to salaried attorneys, they have a constitutional right under that *United Mine Workers* decision, and no decree containing that provision should be permitted.

(30) The other provision, "—from accepting or receiving compensation of any kind, directly or indirectly, for solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise," is also difficult to believe in the context of this lawsuit where the Virginia Supreme Court of Appeals had held that The Brotherhood of Railroad Trainmen had a constitutional right to solicit legal business.

It is also unbelievable in the light of the Mine Workers decision where I cannot think of any method of obtaining business that could be more effective than providing legal services free of charge.

"From sharing in any manner in the legal fees" is also part of the financial connection.

I don't know exactly what benefit the Mine Workers get out of paying the salary of an attorney to represent their injured members, but the fact remains that if they do get some sort of benefit from it, that if the reduced fee to the mine worker client creates some sort of bond between the union and the claimant, that would to my mind create a matter of solidarity so secure that there would never be a chance of a claimant and the union splitting over any issue.

This may not be a financial connection, but (31) your Honor will recall that in the *Hildebrand* Case the Supreme Court of California had held that this nonfinancial benefit

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to the union was a sufficient value to cause the stopping of the operation of the legal-aid plan as it was then constituted in the State of California.

The remainder is also another financial connection between the union and the Brotherhood which has been struck down by *United Mine Workers v. Illinois State Bar Association.*

In speaking of what type of matter might be permissible in this area, Mr. Justice Black states that: "The First Amendment would be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."

Before closing my discussion of the *Mine Workers* Case, I would like to point out that Mr. Justice Stewart separately concurred in the result, striking down (32) the decretal provisions in *Mine Workers* upon the sole ground, quote: "The disposition of this case is controlled by *Trainmen v. Virginia State Bar.*"

I thought so, too. I always thought that the Virginia case prohibited the entrance of any decree. Unfortunately, the chancellor in Virginia disagreed.

In 1965 he entered another decree. We appealed to the Virginia Supreme Court of Appeals, and that decree was struck down; the court holding, as I say, that the *Trainmen* decision in the United States Supreme Court gave the Brotherhood a constitutional right to solicit legal business.

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Since this 1967 decree, we have petitioned for leave to appeal to the Supreme Court of Appeals of Virginia again. In Virginia there is no such thing as a right to an appeal. The petition for leave to appeal was denied March 6 of this year upon the sole ground that this injunction is substantially the same as their opinion and that, therefore, we were in effect asking the Virginia Supreme Court to hear an appeal from its decision. As a result, no court in Virginia has considered the effect of *Mine Workers* Case in this general area of the operation of the Trainmen plan. The time for petition for certiorari to be filed in that case expires on June 4 of this year.

(33) At the present time it appears that we will not file such a petition, because initially we should have to get a decision by the Supreme Court of the United States that in some manner this action by the Virginia Supreme Court was wrong constitutionally or was a device under their own law, to avoid construction of the *Mine Workers* Case. As I say, the possibilities are that we will not.

In any event, I do not urge upon this Court that it delay its decision in any way in this matter because of that pending possibility.

It does seem to me that the Virginia Supreme Court opinion is at least unwise, because until this decree was entered by the Chancery Court of the City of Richmond there was no possible way that any trainman, whether officer or individual member, in the State of Virginia could be subjected to any type of contempt process; and it may be that the Trainmen are well advised to await any attempt by Virginia to seek a contempt proceeding against *Trainmen's* members or officers.

But in any event we respectfully submit to this Court that in this area the law is developing fast. The American

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Bar Association, as I understand it, will come out with a new code of canons and ethics at its annual (34) meeting in August in Philadelphia this year.

The report of the Availability of Legal Services Committee headed by Mr. McCalpin of St. Louis, Missouri, has been substantially in favor of the development of these legal-service plans.

The federal government, itself through the Office of Economic Opportunity, is providing legal services to the indigent and to people in various areas of the city free of charge.

As an aftermath of the *Gideon* Case, a federal criminal defender program has been provided, including provision of trial counsel with the fees to be paid by the United States Government when it is warranted.

I think that under all these circumstances, your Honor, we are dealing with this matter as though it were part of the past. I think legal services are a matter of the future.

I think that many of the people who have been connected with the *Trainmen* Case may be equally as appalled by what is going to come in the future; but whether we are appalled or not, it is The Brotherhood of Railroad Trainmen has the rights. It intends to exercise them. And under the circumstances no decree should be entered.

Thank you.

(35) The Court: Mr. Kelly.

Mr. Kelly: Counsel makes a fervent plea to this Court to allow the solicitation to go on, and I don't care to dwell

on it at any length, but I say to this Court and for the record that this is far from a moot or occasional question in the State of Michigan affecting the members of the State Bar of Michigan.

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Counsel's firm in Chicago is the firm to which the overwhelming number of FELA cases of Michigan residents are run by the solicitation methods of The Brotherhood of Railroad Trainmen.

Mr. Naughton: I object to this, your Honor.

He is calling something solicitation which the Supreme Court of the United States has said is not.

The Court: It is not.

Mr. Kelly: I didn't interrupt you.

Mr. Naughton: I am just objecting.

The Court: All right.

Mr. Kelly: That was the proof submitted to this Court in which the Court entered its original decree.

Now counsel switches to a UMW case, but I suggest that we keep on the track. It was the Virginia case which the Supreme Court of this state directed this Court to follow in amending its judgment, and it is the provisions (36) of the amended Virginia decree which I have incorporated in the proposed judgment.

Counsel picks apart the Virginia decree, says it is all wrong, but it is the exact decree on which the Supreme Court of the United States denied certiorari; and until they do, I think it isn't up to Mr. Naughton to reverse it.

I submit simply this, your Honor: that the remand to this Court was to enter a judgment not inconsistent with

the Virginia decree which is now finalized and which is now the judgment which we submit.

If counsel for the Brotherhood wants to have some other decision, UMW or others, followed in this state, they should direct their argument to the Supreme Court of this state and not to this Court which is under a specific direction as to amending this decree; and I move, your Honor, that it be amended as asked in the motion.

[493]

The Court: As I advised you at the outset, the Court is going to take the disposition of this motion under advisement.

Now, to get back to the motion to dismiss certain defendants and the affidavit which was filed in support thereof: Mr. Naughton and Mr. Nelson, I see no reason why this cannot be noticed for hearing for two weeks (37) from today. Mr. Kelly can get his answer in.

As I stated, perhaps there will be no need for even to hear arguments on it. I don't know at this time. I don't know if Mr. Kelly can answer that at this point.

What I am getting at is this: Let's reserve the question of argument until the whole matter is before the Court and, if there are to be arguments, why, it will be upon written request of either party and the date to be fixed by the Court.

Is that agreeable?

Mr. Naughton: That's agreeable with me, your Honor.

I believe it is my duty to point out to your Honor that since this was filed I have rechecked this and I can find that only Mr. Hasbrouck and Mr. Fieberkorn are officers of the Trainmen.

Mr. Johnson and Mr. Russell, I may find out, are no longer with the Trainmen. I will check them. If they are not, I will find an additional affidavit, I suppose, and ask that it be joined with this one.

The Court: This is a matter of mechanics, so we are talking about time actually here.

How long do you think it would take you to do (38) that? In other words, what I am getting at is—

Mr. Naughton: I think two weeks can still hold off the notice. It shouldn't take me more than a week. The Brotherhood office must have the information.

The Court: So within a period of two weeks Mr. Kelly will know where he stands.

[494]

Mr. Naughton: Yes, sir.

The Court: So he can proceed accordingly. And then, as I stated, after Mr. Kelly's answer is filed to your motion, why, upon request from either party if they wish to have arguments on the matter, why, the Court will fix a date for argument.

Is that agreeable?

Mr. Naughton: Yes, your Honor.

Mr. Kelly: Yes, your Honor. Do I understand—

The Court: You sit tight until Mr. Naughton files his papers and notices it, and perhaps with amendments to the motion to include some others if there are others to be included.

Mr. Kelly: This is to be done within the two-week period that Mr. Naughton says is ample, and not to make the argument two weeks from now at the time he gets whatever amendment he has.

The Court: No.

(39) Mr. Kelly: I will answer it.

The Court: I specifically provided in the disposition I made here that he would have this accomplished in two weeks. You file your answer. And then after you filed your answer, I will say that if either counsel wishes to have oral argument of that motion, that request for the same will be made within ten days after filing and service of your answer to the motion.

That leaves one loophole. How long will it take you to answer?

Mr. Kelly: Me?

The Court: Yes.

Mr. Kelly: I can't answer that until I see it.

The Court: Well—

Mr. Kelly: But I will assure the Court I will get it here.

[495]

The Court: It would seem ten days to answer should be ample.

Mr. Kelly: I would think so.

The Court: You have your answer in in ten days.

And then ten days after the filing and service of your answer, if there are to be oral arguments, they may be had upon request from either counsel and the date (40) thereof fixed by the Court, and counsel notified.

We will stand recessed.

[495] (Certificate of Court Reporter omitted in printing.)

[496] EXHIBIT B, The Constitution of the Brotherhood of Railroad Trainmen omitted in printing.

[497]

43/Oct. 1969

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,
Plaintiff and Appellee,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN, and all other members, agents and officers of the Brotherhood of Railroad Trainmen of the State of Michigan,
Defendants and Appellants

BEFORE THE ENTIRE BENCH

BLACK, J.

In January of 1964 this Court ordered that *State Bar of Michigan v. Brotherhood of Railroad Trainmen*, our Docket No. 50093, stand abeyant "pending final determination, by the Supreme Court of the United States, of the case of *Railroad Trainmen v. Virginia State Bar*, Docket No. 34, certiorari granted 372 US 905."* April 20, 1964 the Supreme Court decided the docketed cause thus brought up on certiorari. *Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar* (1964), 377 US 1, 84 S Ct 1113, 12 L ed 2d 89. That court vacated the injunctive

* The order is quoted in full, *State Bar of Michigan v. Brotherhood of Railroad Trainmen* (1965), 374 Mich at 154, 155.

[498]

decree which had been entered and affirmed in Virginia,* and "remanded for proceedings not inconsistent with this opinion."

October 7, 1964 No. 50093 was resubmitted. January 4, 1965 we reversed and remanded the decree which in the Jackson circuit had been entered September 14, 1962, adding this:

> "Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." (*State Bar of Michigan v. Brotherhood of Railroad Trainmen*, 374 Mich 152, 155).

The ensuing events of present concern appear in *Brotherhood of Railroad Trainmen v. Commonwealth of Virginia ex rel. Virginia State Bar* (1966), 207 Va 182, 149 SE 2d 265 (cert. den. Jan. 16, 1967, 385 US 1027, 17 L ed 2d 675, 87 S Ct 754), and thereafter in the Jackson county circuit court upon remand as ordered. We take up these events in order. The *Virginia Case* and its history comes first.

Through its Commonwealth the Virginia State Bar sued the Brotherhood and others, in the Chancery Court of Richmond, Virginia, to enjoin the carrying on of a "plan" of activity which, according to the Bar, constituted the solicitation of legal business and the unauthorized prac-

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* This Virginia decree is known as "the 1962 decree." It includes the Virginia chancellor's factual findings. See footnote (1), *Brotherhood v. Commonwealth, infra.*

[499]

tice of law in Virginia. The suit was planted upon allegation that the Brotherhood's plan is that of advising its injured members and their families to obtain legal advice prior to making settlement of claims against their employers for injury or death; that the plan results in the channeling of legal employment to particular lawyers approved by the Brotherhood; that the Brotherhood maintains a Department of Legal Counsel for the purposes of the plan, and that the plan violates the laws of Virginia and the ethical codes of the legal profession.

The Chancery Court found that the activities of the Brotherhood pursuant to such plan consisted not only of illegal solicitation of law business but did result in "channeling all, or substantially all' of the employee versus employer business to lawyers chosen by the Brotherhood's Department of Legal Counsel. Upon these and auxiliary findings the chancellor enjoined the complained of activities in Virginia.

The highest court of Virginia affirmed summarily as against the Brotherhood's appeal to the First and Fourteenth Amendments (see *Brotherhood v. Commonwealth, supra* at 2); whereupon the Supreme Court granted certiorari to consider the constitutional question "in the light of our present decision in *NAACP v. Button* (1963), 371 US 415, 9 L ed 2d 405, 83 S Ct 328." The plan of the Brotherhood thus enjoined was analyzed and, within the scope of the questions decided, approved by the Supreme Court in the cited decision of April 20, 1964. The Supreme Court said:

[500]

> "The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention." (p 5)

Then the Supreme Court confronted the organized Bar Associations of the several States, and the subsequently objecting American Bar Association, with this specific ruling:

> We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (p 8)

The appellee-respondent duly petitioned for rehearing. The American Bar Association moved for leave to file a brief *amicus* in support of the petition for rehearing. The motion was granted June 1, 1964 and, on the same day, the petition for rehearing was denied. (377 US 960, 12 L ed 2d 505, 84 S Ct 1625)

The proceedings on remand to Virginia appear at length in the cited 1966 decision of the Supreme Court of Appeals of Virginia. That court, seeking conformity with the Supreme Court's 1964 opinion, analyzed it with manifest care and, we add, with the deferential respect subordinates owe

[501]

to their constitutional superiors.* Since the pleadings, factual record and judgment now here duplicate substantially the pleadings, factual record and now finally effective decree which in Virginia was entered on remand, we need but say that this court of another State must now determine whether that decree comports constitutionally with the aforesaid 1964 opinion. If it does, the Jackson circuit's decretal judgment of May 27, 1968 (now before us for review) should be affirmed. If not, that judgment should be reversed.

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* Respect for the Supreme Court's majority opinion is not quite so evident in the December 1965 issue of Virginia Law Review, "The Brotherhood Case," p 1693. We find portents for our case as well as restrained criticism in this paragraph (p 1697):

> "It is submitted that the Supreme Court's opinion in the *Brotherhood* case, reflecting in its befuddling language the Court's lack of consensus, will prove of only transitory importance. However, it is hoped that it will speed the framing of clearer standards by which to judge practices similar to those advocated by the Brotherhood and sought to be regulated by Virginia. Thus, if the case reaches the Court again, little will be gained unless a definite choice is made between balancing and absolutism. It is also submitted that a balancing test is more appropriate."

Now for the instant case. It was commenced January 28, 1959 in the Jackson circuit for injunctive relief against the same "activities"—occurring as alleged in Michigan—which in Virginia were considered by the Virginia courts and then by the Supreme Court. Decree for the State Bar having entered September 14, 1962, the *Brotherhood* appealed. As seen above, that appeal resulted in reversal and remand for further proceedings not inconsistent with the Supreme Court's opinion of 1964 *Brotherhood*.
[502]

On remand the State Bar did not avail itself of the accorded right to amend. It waited instead for disposition on remand of the *Virginia Case* and then, setting forth the subsequent proceedings in the *Virginia Case* we have outlined, moved for entry of "a judgment in this cause in conformity to said Final Order of the Chancery Court of the City of Richmond, Virginia, as aforesaid."

Legal arguments followed, without additional proofs. The Brotherhood insisted and now insists that the Virginia decree does not conform with 1964 *Brotherhood*. The State Bar argued and argues here that the decretal judgment proposed by it and entered below May 27, 1968 conforms with the now-final Virginia decree. By-passing the Court of Appeals, we granted leave to review that judgment September 12, 1968. The appeal was submitted December 9 last.

First: Our decision will be understood better by making initial reference to a question posed and answer made by counsel during oral argument. Our answer is that when the Supreme Court denied certiorari to review 1964 *Brotherhood* that act made no precedent. Neither did it import an "expression of opinion upon the merits of the case, as

the bar has been told many times" (Holmes, J., writing for the Court in *United States v. Carver* [1923], 260 US 482, 490, 67 L ed 361, 43 S Ct 181). As written separately by Mr. Justice Frankfurter, upon denial of certiorari in *State of Maryland v. Baltimore Radio Show* (1950), 338 US 912, 917, 94 L ed 562, 70 S Ct 252:

[503]

> "A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court."

This view, that no precedent results from denial of review, was written into our own jurisprudence as far back as 1935 (*Malooly v. York Heating & Ventilating Corp.*, 270 Mich 240, 247. There it remains. See *Great Lakes Realty Corp. v. Peters* (1953), 336 Mich 325, 328, 329, comment in *Williams v. City of Detroit* (1961), 364 Mich 231, 288, and our order denying leave to appeal, *Frishett v. State Farm Mut. Automobile Ins. Co.* (1966), 378 Mich 733, 734.

We proceed accordingly to determine whether the present Virginia decree and therefore the duplicative decretal judgment entered by the Jackson circuit,* are consistent with 1964 *Brotherhood*. No reliance may be placed upon the fact that, in 1967, the Brotherhood's petition for writ of certiorari was denied. The situation for us is the same as if the Brotherhood had filed no petition.

It is right to begin by saying that the adjudicatory result in Michigan *ought* to be the same as was reached finally

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* See appendix.

in Virginia. Each suit as commenced, tried and reviewed has been purely equitable from the beginning. The subject matter of both is the extent to which the same planned activity of the Brotherhood comes within the constitutionally exercised jurisdiction of equity. It would reproach the tenet of equal justice under law if, in Virginia, the [504]

decree effective there should vary from the decretal relief which for our part is due to be made effective in Michigan. Starting from such premise, the thrust of which is a reasonable if rebuttable presumption that the Supreme Court is not apt to order that either the Brotherhood or our State Bar suffer or enjoy more in Michigan than do the corresponding antagonists in Virginia, we submit the following compendium of precise convictions reached by comparing *Brotherhood* as decided by the Supreme Court in 1964 with *Brotherhood* as finally settled in Virginia.

We find that the distinctive hub of 1964 *Brotherhood* turns upon desire of the Court, founded as that desire is upon the First and Fourteenth Amendments, that the Brotherhood remain free to help "injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood * * *." (footnote 9, 377 US at 5). Further, although admitting some doubt from here on, we find upon thoughtful comparison of the 1962 decree with the succeeding 1966 decree as entered successively in Virginia, that the highest court of that State has fairly eliminated such of the objections to the 1962 decree as were made by the Brotherhood and upheld by the Supreme Court. See the successive major excisions from the 1962 decree

which Virginia's Supreme Court of Appeals directed, all italicized by the court and portrayed by footnote (4), [505]

207 Va at 187, particularly the elimination of the 1962 banning of solicitation.

The conclusion reached by the Virginia Supreme Court of Appeals reads (207 Va at 189):

> "[2] We interpret the opinion as denying the State's right to restrain these activities. The Court held that the Brotherhood's activities fell within the protection of the First Amendment guarantees of free speech, petition and assembly. In the Court's opinion, the State had failed to show any appreciable public interest that would justify restraint of the Brotherhood's pursuit of constitutionally protected activities."

All this considered, nothing appears in the Supreme Court's opinion that declares or portends greater constitutional regulation of the practice of law than does the quoted interpretation of the Supreme Court's general if not possibly uncertain language.* We decline accordingly to impute to that Court intent that the Brotherhood of Railroad Trainmen should receive more First and Fourteenth Amendment protection than the State of Virginia now provides for it. Holding, then, that the Jackson cir-

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* No disrespect is intended. The 1965 writer for the Virginia Law Review may indeed have been right (ante at . .) in observing that the Supreme Court's opinion was couched to obtain some semblance of a consensus. If true, let it be noted that we too know all about that fact of judicial life and the occasional need it creates. See our recent contributory consension of generality signed by 4 Justices only, in the *Third Circuit Case,* December 8, 1969, 383 Mich .....

cuit's decretal judgment of 1968 is in accord with the present Virginia decree, we align ourselves with that decree. In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia.

Second: The Brotherhood insists that the 1968 decretal judgment denies it the constitutional protection which, in [506]

United Mine Workers of America v. Illinois State Bar Ass'n. (1967), 389 US 217, 19 L ed 2d 426, 88 S Ct 353, was accorded the *Mine Workers' plan* of hiring an attorney on a salary basis to represent its members and their dependents in connection with claims for benefits under the Illinois Workmen's Compensation Act. We do not agree. The narrow question in *Mine Workers* was whether "the operative portion" of the scrutinized Illinois decree, prohibiting "any financial connection between the attorney and the Union," and such other parts of the decree as might be viewed as forbidding that "connection," passed muster under the First and Fourteenth Amendments. The Supreme Court ruled negatively and, as in 1964 *Brotherhood*, vacated the Illinois judgment and decree with remand for further consistent proceedings. The 1968 decretal judgment includes no such prohibition, nor does the Virginia decree of June 13, 1966.

Here we decline to extend or apply *Mine Workers* to our question, a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 *Brotherhood Case*—that only.

The 1968 decretal judgment, a copy of which we have appended, is affirmed. No Costs.

Thomas E. Brennan, C. J.
Harry F. Kelly, J.
John R. Dethmers, J.
Concurred with
Eugene F. Black, J.

[507]

APPENDIX

(Decretal Judgment Entered May 27, 1968, by the Jackson County Circuit Court)

"This court having heretofore and on the 14th day of September, 1962, entered its decree in favor of plaintiff and against defendants in this cause and said decree having been appealed to the Supreme Court of Michigan and having been remanded to this court for proceedings, not inconsistent with the decision of the United States Supreme Court in the case of *Commonwealth of Virginia ex rel Virginia State Bar v. Brotherhood of Railroad Trainmen*, and plaintiff having filed motion to enter judgment, to which motion a copy of said proposed judgment was attached and the court having heard the arguments of counsel, and having duly considered said motion and proposed judgment and being fully advised in the premises,

"Therefore, on motion of counsel for plaintiff, it is ordered and adjudged that defendants herein be, and they are now permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said

Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise, from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."

[508]

43 Oct 1969

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,
Plaintiff and Appellee,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN, and all other members, agents and officers of the Brotherhood of Railroad Trainmen of the State of Michigan,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH
ADAMS, J.

This action was begun on January 28, 1959 by the State Bar of Michigan charging the Brotherhood of Railroad Trainmen, through the operation of its Legal Aid Department (subsequently renamed Department of Legal Counsel), with unlawfully and improperly soliciting large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen and directing those cases to Regional Counsel Henslee and associates in Chicago, Illinois.

The defendants admitted that in many instances, but not in all, a "member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and

recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained."

[509]

The issue as framed by Mr. Phillip C. Kelly, acting as attorney for the State Bar, was "whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal department."

On June 27, 1961, a hearing was held before the Circuit Judge at which time Mr. David J. Walsh, Supervisor of the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, testified. The testimony of Mr. Walsh consisted of records of FELA claims compiled by the Association of American Railroads and tended to establish that during the period July 1, 1953 through the year 1960 there were 482 such cases and that 218 were handled by the Henslee firm.

Additional history of this case is contained in *State Bar of Michigan v. Brotherhood of Railroad Trainmen* (1965), 374 Mich 152, and in the opinion of Justice Black upon this present appeal.

In *Brotherhood of Railroad Trainmen v. Virginia, ex rel Virginia State Bar* (1964), 377 US 1, 84 S Ct 1113, 12 L ed 2d 89, the United States Supreme Court said (p 8):

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan *for advising workers who are injured to obtain legal advice and for recommending specific lawyers.* Since the part of the decree to which the Brotherhood ob-

jects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (Emphasis added.)

[510] On December 5, 1967, the United States Supreme Court spoke again in the case of *United Mine Workers of America, District 12* v. *Illinois State Bar Association, et al* (1967), 389 U.S. 217, 88 S. Ct. 353, 19 L. ed. 2d 426. In that case the United States Supreme Court held (pp. 221, 222):

> "We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."

I agree with Justice Black that when the United States Supreme Court denied certiorari in 1967 to review *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel Virginia State Bar* (1966), 207 Va. 182, 149 S.E. 2d 265, that act made no precedent. I disagree with Justice Black that the decretal judgment entered May 27, 1968 by the Jackson County Circuit Court is consistent with 1964 *Brotherhood* or 1967 United Mine Workers.

Even if the decree could be sustained under the decision in *Railroad Trainmen*, it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers*.

[511] I would vacate the judgment for the further reason that this is a chancery case in which the State Bar of Michigan seeks injunctive relief. The State Bar failed to amend or update its complaint upon remand by this Court and it failed to produce any proofs, other than the testimony of

Mr. Walsh relating to the period from July 1, 1953 through the year 1960. Neither the trial court nor this Court should afford injunctive relief upon proofs as stale as these, the very most recent of which relate to a period 10 years ago. Furthermore, the evidence is wholly inadequate to sustain the injunctive relief which was granted.

We have repeatedly cautioned against granting injunctive relief prior to full hearing and clear and convincing proofs. See: *Cross Company* v. *UAW Local No. 155 (AFL-CIO)* (1963), 371 Mich. 184; *School District for the City of Holland* v. *Holland Education Association* (1968), 380 Mich. 314.

I would reverse the trial court and vacate the decretal judgment which it entered.

THOMAS M. KAVANAGH, J.

THOMAS M. KAVANAGH, J.
Concurred with
PAUL L. ADAMS, J.

[512]

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of March in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable Thomas E. Brennan, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

The State Bar of Michigan, *Plaintiff*, vs. The Brotherhood of Railroad Trainmen, et al., *Defendants and Appellants*	52106

This cause having been brought to this Court by appeal from the circuit court for the county of Jackson, and having been argued by counsel and due deliberation had thereon, IT IS NOW ORDERED by the Court that the judgment entered May 27, 1968 by the Jackson County Circuit Court be and the same is hereby AFFIRMED. It is further ordered that no costs be allowed.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of April in the year of our Lord one thousand nine hundred and seventy.

DONALD F. WINTERS,
Clerk.

* * * * *

[532]

Order entered by Supreme Court of Michigan on May 4, 1970 providing:

> "In this cause an application for rehearing having been heretofore filed herein, it is hereby denied."

(Certificate of Clerk to Order omitted in printing)

(Certificate of Clerk to the Certified Record omitted in printing).

File No......

Supreme Court of the United States

OCTOBER TERM, 19

Term No......

ORDER GRANTING PETITION FOR CERTIORARI

Filed ....., *19*

U. S. GOVERNMENT PRINTING OFFICE 550070

Supreme Court of the United States

No. 434 ------, October Term, 19 70

United Transportation Union,

Petitioner,

v.

The State Bar of Michigan

Order allowing certiorari. Filed October 12, -----, 19 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan *is granted.*

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
JUL 28 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

THE STATE BAR OF MICHIGAN,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN, and all members, agents and officers of the Brotherhood of Railroad Trainmen in the State of Michigan,

Petitioner,

v.

THE STATE BAR OF MICHIGAN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

Petitioner, UNITED TRANSPORTATION UNION, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered on March 9, 1970, and further prays that the said judgment be summarily reversed without remandment.

OPINIONS BELOW

The first opinion of the Circuit Court for the County of Jackson filed on September 12, 1962 (R. 135-138) is unreported and is printed as Appendix B hereto. The first opinion of the Supreme Court of Michigan (R. 448-449) is reported at 374 Mich. 152, 132 N.W. 2d 78 and is printed as Appendix C hereto. The second opinion of the Jackson Circuit Court entered after remand (R. 458-460) is unreported and is printed as Appendix D hereto. The second opinion of the Michigan Supreme Court and the dissent thereto (R. 497-511) is reported at 383 Mich. 201, 174 N.W. 2d 811 (1970) and is printed as Appendix E hereto.

JURISDICTION

The judgment of the Supreme Court of Michigan (R. 512) was entered March 9, 1970 and is printed in Appendix E hereto, infra page 41. The union's duly filed Petition for Rehearing was denied on May 4, 1970 (R. 572). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), the Petitioner claiming rights under the Constitution of the United States and questioning the validity of the Michigan Statute relied upon to sustain the injunction affirmed.

QUESTIONS PRESENTED

1. Does a State Court Injunction conflict with rights guaranteed to railroad trainmen union members under the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins such members from acts arguably involved in the union's basic plan affording

its members the opportunity to accept or reject union counsel to represent them in personal injury or death claims under the Federal Employers' Liability Act?

2. Is the granting of such an injunction prohibited by the decisions of this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967)?

3. Does the granting of that injunction based upon a Complaint filed in 1959 and on evidence heard in 1961 enjoining acts never pleaded nor proved deprive Petitioner of procedural due process?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statute involved is §28.642 of the Michigan Statutes. The part relied on (R. 26) by the State Bar is printed in Appendix A hereto.

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States which provide as follows:

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

a. *The Pleadings and How the Federal Questions Were Raised.*

This action was commenced by a Complaint filed on January 28, 1959 (R. 21). An Answer was filed on June 9, 1959 (R. 29) to which a Reply was filed (R. 40). The trial of the case in 1961 (R. 67-134) was basically a conflict between the two parties as to the legal effect of the positions set out in the 1959 pleadings. The State Bar supplemented its pleadings by means of one witness. The union rested without presenting evidence (R. 134).

The essential thrust of the Complaint was stated in paragraph 5 thereof (R. 23-24) charging the defendants with engaging in a "well-organized and systematized solicitation" of FELA Claims. Defendant denied the characterization alleged and pled:

> "Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee or his bereaved family, the advis-

ability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver that some of the said members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five per cent (25%) of the amount of any recovery whether the recovery be effected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim."

Plaintiff also alleged that representatives of the Brotherhood were reimbursed for their time lost and their out-of-pocket expenses in bringing injured employees to the offices of the Brotherhood's attorneys (R. 14). In answer thereto, the Brotherhood stated that such reimbursement had continued up to March 31, 1959 but had been wholly discontinued by order of the president of the union on March 16 which order was to be effective on April 1, 1959 (R. 31-Para. 5).

A copy of the order of the president to all legal counsel is contained in the First Affirmative Defense of the Brotherhood (R. 33-34). In that Affirmative Defense, the Brotherhood pled that it was complying with the decision of the Supreme Court of Illinois which permitted the practices in which it was then engaged. *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 150 N.E. 2d (1958). Plaintiff's reply to this Affirmative Defense (R. 43-45) did not deny any of the factual allegations, but denied the legal conclusion that the case was moot and further denied that compliance with the Illinois decision was certain and averred that compliance with the Illinois decision would, nevertheless, be a violation of the Michigan statute pro-

hibiting solicitation of personal injury and death claims, which statute was pleaded in paragraph 11 of the Bill of Complaint (R. 25-26). Defendant denied the Michigan statute applied to it and, in their Third Affirmative Defense (R. 35) stated that any application of the said statute to apply to the Brotherhood Plan would be contrary to rights granted by the Railway Labor Act and by the Constitution of the United States.

Plaintiff sought an injunction permanently enjoining the Brotherhood of Railroad Trainmen in only one respect, specifically from engaging in the solicitation of Federal Employers' Liability Claims in the State of Michigan (R. 27). Plaintiff similarly claimed that it was entitled to an injunction against "solicitation" in its statement of claim (R. 62-63).

Defendant Brotherhood in its Concise Statement of Defense stated, among other things, that the State Bar was attempting to enjoin the Brotherhood on the basis of selected statements from the Illinois Supreme Court Opinion alleged as facts though the allegations were based solely on information and belief; that there was no violation of the Michigan statute; and that the Brotherhood's Plan was protected by rights granted by the Constitution of the United States of America, by federal statutes, and by considerations of public policy (R. 65-67).

b. *The Trial and the Exhibits.*

On June 27th, 1961 the trial opened with counsel for the parties present (R. 67). The first 34 pages of the 86 page transcript of this trial are occupied with an Opening Statement for the State Bar consisting largely of exchanges between counsel and abstractions from their discussions of the Bill of Complaint (R. 68-94).

Near the close of the Opening Statement, counsel for the State Bar said:

> "***We haven't offered *any proof as to disputed matters.* We do not intend to.***" (Italics added R. 93)

The State Bar offered as its only witness David J. Walsh (R. 94) who testified that he was Supervisor of the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, which is comprised of railroads operating in the United States (R. 95). The records of the Association of American Railroads had been kept under his supervision since July 1, 1953 and it was the regular course of his business to keep the records (R. 95). He had with him the records of claims of Michigan residents under the FELA against railroad members of the Association (R. 96).

On FELA cases arising in Michigan from July 1, 1953 to March 31, 1955, the Brotherhood's counsel objected on the ground that they are incompetent, irrelevant and immaterial (R. 96). To this objection (R. 449) counsel for the State Bar replied that:

> "The *only issue* in this case as we see it*** is whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal aid department. That is placed in issue in our bill and denied by the answer, and this is evidence offered in support of the bill" (R. 96). (Emphasis supplied.)

The cards testified to came from unidentified sources compiled under the supervision of the witness. These cards were submitted and reports made to the organization of the witness, the Claims Research Bureau, during periods from July 1, 1953 through December 31, 1960.

However, the said cards referred to accidents and settlements made outside the periods, for example: The claim of Richard F. Baker was for an accident suffered on April 26, 1946 and presumably was settled in that year (R. 183) though it was reported to the Claims Research Bureau on December 22, 1953.

On cross examination, the witness testified that he had no personal knowledge of the material contained in the cards. After the defendant's motion to dismiss at the close of the plaintiff's case was denied, the defendant rested.

c. *The 1962 Decision and Decree*

The trial court's decision (R. 135-139, Appendix B) held that the "***recommendation of counsel by the Brotherhood is the nub of the proceedings*** the right of freedom of speech being basically involved" (R. 136). The injunctive provisions of the Decree enjoined the Brotherhood in six respects relating to the procurement, within the State of Michigan, of a lawyer to render "any" legal services (R. 142-143). These injunctive provisions essentially prohibited the making of unsolicited calls upon a "person" or his representative for the purpose of arranging for the employment of a lawyer or for the purpose of furnishing a lawyer to such person or representative.

d. *The Mandate of the Michigan Supreme Court.*

The 1962 Decree was appealed but before argument, the United States Supreme Court handed down its Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). The Michigan Supreme Court thereupon remanded to the Circuit Court stating (R. 449, Appendix C) at 374 Mich. 152, 132 N.W. 2d 78, 79 (1965):

"Now that the Supreme Court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson Circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.

"Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

e. *Proceedings on Remand*

After remand, a motion was made for further proceedings by the State Bar (R. 450). This motion was heard on February 5, 1965 with counsel for the State Bar stating: "The plaintiff does not care to amend the Complaint. . .". Defendant insisted upon the amendment of that Complaint and the matter was taken under advisement (R. 472-483), with briefs being filed on both sides. No ruling was ever made on that motion.

In April of 1968, a motion for judgment was made (R. 454-456). The hearing was had on May 3, 1968. The State Bar urged the adoption of a Decree entered in the State of Virginia after remand by the United States Supreme Court of Appeals of the State of Virginia (R. 483). In response, the Brotherhood stated that the mandate of the Supreme Court of Michigan required the filing of a new Complaint, that the Decree was contrary to the *Brotherhood of Railroad Trainmen decision,* and that the *United Mine Workers* case handed down by the United States Supreme Court in December of 1967 was also directly relevant (R. 484). The trial court denied these contentions of the *Brotherhood.* It entered its Opinion and Order, and Decree on May 24, 1968 (R. 458-461).

In that Opinion, the court dismissed all of the individually named defendants and entered its Decree against the *Brotherhood of Railroad Trainmen* and all of its agents and officers in the State of Michigan (R. 459). The court stated that the Supreme Court of Virginia had modified the Decree entered on remand by the Virginia trial court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966). The court distinguished the *Mine Workers* case as being limited to the hiring of attorneys on a salary basis and stated that its Decree was in conformity with the interpretation of the Supreme Court mandate as made by the Virginia Supreme Court (R. 459, Appendix D).

On appeal the Michigan Supreme Court affirmed the 1968 injunction. In its Opinion (Appendix E) the Michigan Supreme Court, while indulging in language which is most turgid, appears to hold that it was compelled to affirm the decree because of the fact that it is similar to a decree affirmed as modified by the Virginia Supreme Court of Appeals at 207 Va. 182, 149 S. E. 2d 265.

The Brotherhood of Railroad Trainmen and other national railway operating unions were negotiating with a view towards merging while plaintiff was moving for judgment in this case. Since the Decree was entered, a referendum vote was held among the membership of the organizations and on January 1, 1959, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union, along with the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. This petition is made by the successor union.

REASONS FOR GRANTING THE WRIT

I.

THE MAJORITY OPINION AND JUDGMENT SERIOUSLY RESTRICTS THE PETITIONER'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND IS CONTRARY TO IMPORTANT DECISIONS OF THIS COURT.

The decree here involved was entered with the purpose of interfering with the railroad workers in the exercise of their constitutional rights. It was further entered with the purpose of granting the same relief in Michigan as had been granted in Virginia. (This is said to be required by the principle of "'equal justice under law," a principle accorded the State Bar alone and never considered as applying to the union, Appendix E, p. 37). It is submitted that the entry of the decree in such circumstances obviously offends constitutional freedoms of speech, petition and assembly and alone requires both the granting of the writ of certiorari and the summary reversal of the judgment below without remandment.

The opinion below recognizes that this Court not only reversed certain sections of the Virginia injunction of 1962 but further recognizes that this Court remanded with instructions that the basic plan must not be affected or forbidden by the other sections and that the lawyers involved must be accorded "a like protection." Despite this recognition, the majority opinion in the court below never discusses any of the injunctive provisions but instead defers to the 1966 Opinion by the Virginia Supreme Court of Appeals.

In discussing that case, the court below states that it does not rely on "the fact" that the Brotherhood's petition for certiorari was denied. The fact is, however, that it was the Virginia State Bar's Petition which was denied (385 U.S. 1027). After remandment and entry of the modified decree by the trial court, the Brotherhood petitioned for leave to appeal which was denied upon technical grounds.[1] The dubious value of that case as precedent renders the reliance thereon by the majority opinion even more unwarranted.

The decretal judgment entered, moreover, contained no findings of fact unlike the Virginia decree from which it was copied. (The Virginia findings affirmed in 1966 surprisingly contained findings of "solicitation" and of the "unauthorized practice of law" despite this Court's holding to the contrary.) On the other hand, the prior 1962 Michigan findings of fact (R. 139-142) would not aid the decree since the plan was basically found to violate the Michigan statute prohibiting "solicitation." In 1962, the trial court stated (R. 136):

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1. The Order entered on March 6, 1968 reads as follows:
"The petition of Brotherhood of Railroad Trainmen for an appeal from a decree entered by the Chancery Court of the City of Richmond on the 20th day of June, 1967, in a certain chancery cause then therein depending, wherein the Commonwealth of Virginia, ex rel. Virginia State Bar was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, in that the petitioner in effect seeks an appeal from the final order entered by this court on June 13, 1966 (207 Va. 182, cert. denied, 385 U.S. 1027), doth reject said petition and refuse said appeal."

> "The problem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved."

After this Court confirmed that analysis in 1964 Brotherhood, the trial court ignored it in 1968 and deferred to Virginia in entering the present decree. In doing so, it refused to require the State Bar to amend its Complaint to seek the expanded relief which it obtained despite the petitioner's protests (R. 471, 471, 484) and despite the remandment order of the Michigan Supreme Court requiring such an amendment. Instead, the State Bar was permitted to wait 3 years before submitting the present decree on the ground that it had a privilege or an election not to ". . . . avail itself of the accorded right to amend" (Appendix E, p. 35). This alternative was not pointed out to Petitioner until it received the Majority Opinion.

The lack of substance to Respondent's case at this point was typical. The case began in 1959 by the filing of a Complaint which paraphrased certain language from the decision of the Illinois Supreme Court. See, *In Re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). That paraphrasing alleged only a pattern of "solicitation" (R. 21-27). No evidence was introduced in support of those allegations other than some cards received by the Association of American Railroads (R. 178-446). On this point, as on all points, the dissent says it all. No injunction shoud be granted on such stale proofs which do not sustain the relief granted (Appendix E, p. 44).

The instant case is not merely theoretical. The six specific injunctive provisions, most assuredly, can be used to stultify the legal services plan of the Petitioner even

though this Court has already held that Plan to be constitutionally protected. On the other hand, the State Bar has failed to show any "appreciable public interest" requiring the injunctive provisions entered. That being so, the injunction should be stricken down.

The first injunctive provision prohibits ". . . giving or furnishing legal advice to . . . members or their families . . ." (Appendix E, p. 41). That provision strikes at the heart of the Petitioner's plan. As this Court stated in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5, 6:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

Petitioner also objects to each of the remaining 5 injunctive provisions on similar grounds. Each can be misconstrued by the railroads to strike at the heart of the plan. Each can be used to chill the exercise of constitu-

tional rights. For instance, the second finding is an attempt to threaten Petitioner's members with contempt on the ground that they have aided "any lawyer" to "obtain legal employment." Moreover, this provision was modified into its present form by the Virginia Supreme Court stating that the lawyers involved could only "accept" employment under its interpretation of this Court's language. It then states [*Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 271, 272]:

> "By another assignment of error, the Brotherhood objects to the portion of the 1965 decree enjoining the Brotherhood
>
> 'from informing any lawyer or lawyers or any person whomsoever that an accident has been suffiered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of ob-obtaining legal employment for any lawyer.'
>
> This injunction is directed against the furnishing of information for the purpose of enabling lawyers to solicit legal employment. The majority opinion upholds the workers' 'constitutionally guaranteed right to assist and advise each other' (377 U.S. at 6, 84 S. Ct. at 1116, 12 L. Ed. 2d at 93). It does not, in our opinion, give the Brotherhood the right to take action that is designed to enable lawyers to solicit employment. We therefore overrule the Brotherhood's objection, except insofar as it relates to the words 'or any person whomsoever.' After those words are deleted, the injunction will clearly restrain only actions designed to assist lawyers in running and capping for themselves.

The fine distinction, of course, is not known, if ascertainable, to the members of Petitioner in Michigan. Nor are such members able to evaluate the conflict between

that language and this Court's language on the same point. The acceptance of the Virginia Opinion, which lacks a willingness to accept this Court's mandate in *Brotherhood,* is clearly unwarranted.

In summary, as the dissent states, the decretal judgment is not consistent with this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) [Appendix E, p. 44].

When *United Mine Workers* v. *Illinois Bar Asso.,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) is considered it is clear that the judgment below grossly and erroneously restricts the Petitioner's constitutional rights. As the dissent below states ". . . it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers* (Appendix E, p. 44)

The majority below, nonetheless, seeks to distinguish Mine Workers on the ground that it involved a "financial connection" not present in the instant case. Incredibly, this was the same ground relied on by the Illinois Supreme Court which was reversed by this Court. The attempted distinction further flies in the face of this Court's statement at 389 U.S. 224:

> "Nor can the case at bar be distinguished from the Trainmen Case in any persuasive way."

In fact, the attempted distinction is wholly groundless. The injunction below prohibits mainly any financial connection between the Petitioner and its counsel. Both plans are equally in violation of the first provision of the injunction below, i.e., both *Mine Workers* and *Trainmen* involve the "giving or furnishing of legal advice." There can be no closer financial connection between a union and its coun-

sel than the employment of counsel on a salary as in Mine Workers. Since this is permitted and the union here may decide to modify its plan in such fashion in the future, it is astounding to find the Majority Opinion attempting to distinguish the cases on that ground.

The further statement by the Majority Opinion, it is submitted, shows clearly that this distinction was not truly relied upon but was instead another example of an unwillingness to follow the decisions of this Court. This is clearly shown when the Court states (Appendix E, p. 40):

> "Here we decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 *Brotherhood Case*—that only."

Indeed, the Supreme Court of Michigan shows a disregard of the Opinions of this Court which borders on contempt when it states (Appendix E, p. 39):

> "In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia."

It is respectfully submitted that this Court should send such a specific order back to Michigan by granting the Petition for Writ of Certiorari and by summarily reversing the injunction without remandment.

II.

THE OPINION AND JUDGMENT BELOW BEING BASED UPON ACTS NEVER PLEADED NOR PROVEN AND WITHOUT A HEARING DEPRIVES THE PETITIONER OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

The case began in 1959 with the paraphrasing of an Opinion of the Illinois Supreme Court in a Complaint

which was based upon a Michigan Statute prohibiting the "solicitation of legal business." This is the only pleading upon which the judgment below could be based. It is, however, quite clear that the statute no longer retains any validity or any applicability to the Petitioner's union, both because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and because of this Court's prior decision in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). In *Button,* a similar statute was stricken down because of its overbreadth as to the furnishing of legal services by the association there involved.

Here, there are no findings of fact (unlike the Virginia Decree which was copied) and there are no allegations in any pleading relating to the injunctive provisions entered in the Decree. Moreover, there is no evidence establishing any such matters. In such circumstances, the Decree entered is not only contrary to the decisions of this Court but is also so gross as to offend constitutional guarantees of due process. Where an injunction decree is not based upon the pleadings and is not supported by proof, it is clear that the court is without any jurisdiction to issue it. Even where there has been proof of the commission of unlawful acts, other unlawful acts disassociated from those proven should be stricken from an injunction decree. *State of Wyoming* v. *State of Colorado,* 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company,* 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB,* 362 U.S. 479 (1960). When a proceeding has been instituted based upon particular charges, it is a denial of procedural due process for the court to enter a decree based upon

charges not originally made. Procedural due process requires fair notice of the charge. *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

It is no assistance for the court below to state that the State Bar had an election as to how it chose to proceed, either by amendment or by awaiting the decision of the Virginia Supreme Court of Appeals to see if it was favorable. This is especially so since the prior order of the Michigan Supreme Court (Appendix C) did not set out any such alternative but, instead, stated that the State Bar was granted leave to amend the Complaint if it decided to seek relief not inconsistent with the 1964 Brotherhood case.

It is, of course, contrary to elementary standards of justice to change the theory on which the case is tried after trial. It is equally contrary to elementary standards of justice to enter an injunction without any allegations, without any evidence or without any findings of fact in support thereof. The said action of the trial court went beyond its jurisdiction and was offensive to procedural due process. If charges had been made, procedural due process would also have required a hearing so that the Petitioner could have the opportunity to rebut the charges. It is respectfully submitted that for this reason alone, the Petition for Writ of Certiorari should be granted and the judgment should be summarily reversed without remandment. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963).

CONCLUSION

For the reasons adverted to above and because of the demands of law and of substantial justice, the Petition for Writ of Certiorari should be granted and, after the granting of the writ, the Judgment and Opinion of the Supreme Court of Michigan should be reversed per Curiam without remandment.

Respectfully submitted,

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July —, 1970

APPENDIX A

§28:642 of the Michigan Statutes:

"Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership association or organization of any kind, either incorporated or unincorporated, or of any division, bureau or committee of such association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor***."

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON, IN CHANCERY.

THE STATE BAR OF MICHIGAN,
Plaintiff,
vs.
THE BROTHERHOOD OF RAILROAD TRAINMEN,
Defendants.

Number T-640
DECISION

This is an action based on a bill of complaint filed in behalf of the State Bar of Michigan on January 28, 1959. Answer thereto was filed on behalf of the defendants on June 9, 1959. A reply was filed by plaintiff on June 16, 1959. Suffice it to say that subsequent amended pleadings were withdrawn.

It was agreed between counsel that the record in this case should be transcribed before the filing of briefs. This was completed, and the matter was ready for disposition by this Court approximately May 1, 1962, including a motion to strike a portion of plaintiff's reply brief having to do with decrees entered in similar situations in other jurisdictions.

With reference to the motion to strike, the same is hereby denied, as this Court may consider any authorities it deems applicable.

An examination of the aforesaid pleadings discloses in substance that the practices complained of were in exis-

tence up to May 31, 1959. It is the claim of defendants that they have been in compliance with the decree entered in the case of *In re Brotherhood of Railroad Trainmen* as reported in 150 Northeastern, 2d Series, at page 163, as evidenced by the letter of March 16, 1959, as set forth in the first affirmative defense, from W. P. Kennedy, President, and directed to all lodges and members and to all legal counsel, Brotherhood of Railroad Trainmen. Because of the indefiniteness and uncertainty therein in relation to the practices complained of, such a defense position is untenable.

In the aforesaid Illinois case, among other rulings and directives, it was held as follows:

> "The objective of the Brotherhood in seeking to secure competent legal representation of its members can be accomplished without lowering the standards of the legal profession. The Brotherhood has a legitimate interest in investigating the circumstances under which one of its members has been injured. That interest antedates the occurrence of any particular injury. We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood.
>
> "The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully."

The probem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved.

This same matter has been before the courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states, in one form or another, have approved the decision of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel.

This Court feels that the plaintiff is entitled to relief.

Plaintiff has submitted a proposed decree with which this Court is in accord, with the following exceptions:

1. The word "all" at the end of line 4 of paragraph 6 on page 3 will be deleted.

2. Subparagraph (d) on page 5, the last line thereof, will be rephrased as follows: "the employment of any particular lawyer or group of lawyers by such person."

3. Subparagraph (e) on page 5 is approved but hereby designated as "subparagraph (f)," and in place and stead thereof shall be inserted subparagraph (e), as follows: (e) Engaging in any activity, conduct, or endeavor condemned by the Supreme Court of Illinois in the opinion above referred to."

I should not close without adding the following:

The first affirmative defense is without merit. See *Seifert* v. *Buhl Optical Company,* 276 Michigan, 692, and cases therein cited.

The third affirmative defense is without merit, as is set forth in the Illinois case aforesaid.

Upon the above corrections and additions being made, a decree accordingly will be subscribed and enrolled in this court.

I believe that I should make the following observation with reference to subparagraph (e), having to do with the decision of the Illinois Supreme Court, and that is that although certain specific activities and conduct as contained in the Illinois decision were not specifically pleaded in the instant suit, nevertheless, by the defendants' answer, they have been indirectly injected into this litigation and should be covered by the Court's order.

As requested by the office of Mr. Arthur C. Lumley, a copy of this opinion is being forwarded to the office of Henslee & Henslee in Chicago, Illinois.

(Signed) JOHN C. DALTON
John C. Dalton,
Circuit Judge.

Dated: September 12, 1962.

APPENDIX C

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,

Plaintiff and Appellee,

v.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

Defendants and Appellants.

BEFORE THE ENTIRE BENCH
BLACK, J.

Plaintiff's bill was filed January 28, 1959, in the Jackson Circuit. It was designed to obtain relief corresponding to that which was sought about the same time by the Virginia State Bar, against the same defendant Brotherhood, in the chancery court of Richmond, Virginia. For the history of the Virginia Case, and for understanding of its ultimately controlling effect here, we refer to Brotherhood of *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* —— *U.S.* ——, 12 L. Ed. 2d 89, 84 S. Ct. ——, decided April 20, 1964.

The Jackson county circuit court ruled in favor of the plaintiff State Bar, finding as applicable certain then unreversed and apparently controlling lower court decisions. The circuit court concluded:

> "This same matter has been before the courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states, in one form or another, have aproved the decisions of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel."

"This court feels that the plaintiff is entitled to relief."

Decree below, entered under date of September 14, 1962, enjoined the defendants in much the same manner as was done by the chancery court of Richmond. The defendants having appealed from such decree, and it appearing that submission to the Supreme Court of the Virginia Case was then imminent, order entered here January 2, 1964 as follows:

"On reading and filing appellants' [illegible]er 26 motion for continuance, and upon considera[illegible] the summary appearing in 32 LW 3006 pertaining t[illegible]ke questions that are due for January argument in the case identified below;

"It is ordered that submission of this cause on appeal be and the same is hereby continued pending final determination, by the Supreme Court of the United States, of the case of *Railroad Trainmen* v. *Virginia State Bar,* Docket 34, certiorari granted 9 L. Ed. 2d No. 7, p. 715.

"It is further ordered that appellants' motion for certification of this cause, to the Supreme Court, be and the same is denied."

Now that the supreme court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.

Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion.

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*The Virginia Case, to which the circuit court referred, was of course the decision which per foregoing citation was reviewed and reversed by the Supreme Court.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR

THE COUNTY OF JACKSON

THE STATE BAR OF MICHIGAN,
Plaintiff,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,
Defendants

No. T-640
OPINION AND ORDER

Pursuant to the directive of the supreme court of this state in the case of *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen*, 374 Michigan, 152, 155, this matter was noticed for hearing before this Court for entry of an order not inconsistent with the United States Supreme Court opinion in *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1, 12 L. Ed. 2d, 89.

Motion for judgment in accordance with the foregoing was argued before this Court by both counsel on May 17, 1968.

Subsequent to entry of the United States Supreme Court decision aforesaid, this matter once again came before the Supreme Court of the State of Virginia on June 13, 1966, (re hearing denied September 13, 1966) and upon which case certiorari to the United States Supreme Court has also been denied, wherein the said Supreme Court of the State of Virginia made its determination of what would be a proper order under the mandate of the United States Supreme Court.**

Upon argument before the Court, considerable stress was laid upon the holding of the United States Supreme Court in *United Mine Workers* v. *Illinois Bar Association*, 19 L. Ed. 2d, 426, wherein it was held that the First and Fourteenth Amendments gave the mine workers the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

As pointed out in the footnotes on page 428, the opinion and holding was limited to this one aspect of the union's activities.

It must also be kept in mind that the same general principle; that is, actual payment of the attorneys by the association involved, had been before the United States Supreme Court in the case of *NAACP* v. *Button*, 371 U.S. 415, 9 L. Ed. 2d 405.

There is nothing in the *United Mine Workers* Case which would prohibit or change entry of the proposed order which is in conformity with the interpretation of the supreme court mandate as made by the Virginia Supreme Court.

Also before this Court were two motions to dismiss as to individually-named defendants, with the exception of L. M. Hasbrouck, Raymond Fieberkorn, and R. J. Johnson.

Said motions to dismiss are hereby granted, and it is so ordered.

For the reason that this is a class action and that there are only the above three named individual defendants remaining in this matter, this Court hereby, *sua sponte*, orders this matter dismissed as to the remaining three also.

So there will be no misunderstanding, the remaining defendants herein are The Brotherhood of Railroad Trainmen in the State of Michigan.

Counsel for plaintiff is hereby directed to redraft the proposed judgment submitted to this Court, omitting from the title thereof the individually-named defendants against whom this action has now been dismissed, and present said corrected judgment forthwith to this Court for signature.

It is so ordered.

(Signed) JOHN C. DALTON

John C. Dalton,
Circuit Judge.

**Addendum:

The 1966 Virginia case above referred to is *Brotherhood of Railroad Trainmen* v. *Commonwealth,* 207 Virginia, 182; 149 S.E. 2d, 265.

Dated: May 24, 1968.

APPENDIX E

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,

Plaintiff and Appellee,

v.

THE BROTHERHOOD OF RAILROAD TRAINMEN, and all other members, agents and officers of the Brotherhood of Railroad Trainmen of the State of Michigan,

Defendants and Appellants.

BEFORE THE ENTIRE BENCH

BLACK, J.

In January of 1964 this Court ordered that *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen,* our Docket No. 50093, stand abeyant "pending final determination, by the Supreme Court of the United States, of the case of *Railroad Trainmen* v. *Virginia State Bar,* Docket No. 34, certiorari granted 372 US 905."[1] April 20, 1964 the Supreme Court decided the docketed cause thus brought up on certiorari. *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar* (1964), 377 US 1, 84 S Ct 1113, 12 L ed 2d 89. That court vacated the

1. The order is quoted in full, *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen* (1965), 374 Mich at 154, 155.

injunctive decree which had been entered and affirmed in Virginia,[2] and "remanded for proceedings not inconsistent with this opinion."

October 7, 1964 No. 50093 was resubmitted. January 4, 1965 we reversed and remanded the decree which in the Jackson circuit had been entered September 14, 1962, adding this:

> "Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." (*State Bar of Michigan* v. *Brotherhood of Railroad Trainmen*, 374 Mich 152, 155).

The ensuing events of present concern appear in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar* (1966), 207 Va. 182, 149 S.E. 2d 265 (cert. den. Jan. 16, 1967, 385 U.S. 1027, 17 L. ed. 2d 675, 87 S. Ct. 754), and thereafter in the Jackson county circuit court upon remand as ordered. We take up these events in order. The *Virginia Case* and its history comes first.

Through its Commonwealth the Virginia State Bar sued the Brotherhood and others, in the Chancery Court of Richmond, Virginia, to enjoin the carrying on of a "plan" of activity which, according to the Bar, constituted the solicitation of legal business and the unauthorized practice of law in Virginia. The suit was planted upon allegation that the Brotherhood's plan is that of advising its injured members and their families to obtain legal

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2. This Virginia decree is known as "the 1962 decree." It includes the Virginia chancellor's factual findings. See footnote (1), *Brotherhood* v. *Commonwealth*, *infra*.

advice prior to making settlement of claims against their employers for injury or death; that the plan results in the channeling of legal employment to particular lawyers approved by the Brotherhood; that the Brotherhood maintains a Department of Legal Counsel for the purposes of the plan, and that the plan violates the laws of Virginia and the ethical codes of the legal profession.

The Chancery Court found that the activities of the Brotherhood pursuant to such plan consisted not only of illegal solicitation of law business but did result in "channeling all, or substantially all" of the employee versus employer business to lawyers chosen by the Brotherhood's Department of Legal Counsel. Upon these and auxiliary findings the chancellor enjoined the complained of activities in Virginia.

The highest court of Virginia affirmed summarily as against the Brotherhood's appeal to the First and Fourteenth Amendments (see *Brotherhood v. Commonwealth, supra* at 2); whereupon the Supreme Court granted certiorari to consider the constitutional question "in the light of our present decision in *NAACP* v. *Button* (1963), 371 U.S. 415, 9 L. ed. 2d 405, 83 S. Ct. 328." The plan of the Brotherhood thus enjoined was analyzed and, within the scope of the questions decided, approved by the Supreme Court in the cited decision of April 20, 1964. The Supreme Court said:

> "The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention." (p. 5).

Then the Supreme Court confronted the organized Bar Associations of the several States, and the subsequently objecting American Bar Association, with this specific ruling:

> We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (p. 8).

The appellee-respondent duly petitioned for rehearing. The American Bar Association moved for leave to file a brief *amicus* in support of the petition for rehearing. The motion was granted June 1, 1964 and, on the same day, the petition for rehearing was denied. (377 U.S. 960, 12 L. ed. 2d 505, 84 S. Ct. 1625).

The proceedings on remand to Virginia appear at length in the cited 1966 decision of the Supreme Court of Appeals of Virginia. That court, seeking conformity with the Supreme Court's 1964 opinion, analyzed it with manifest care and, we add, with the deferential respect subordinates owe to their constitutional superiors.[3] Since

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3. Respect for the Supreme Court's majority opinion is not quite so evident in the December 1965 issue of Virginia Law Review, "The Brotherhood Case," p. 1693. We find portents for our case as well as restrained criticism in this paragraph (p. 1697):

the pleadings, factual record and judgment now here duplicate substantially the pleadings, factual record and now finally effective decree which in Virginia was entered on remand, we need but say that this court of another State must now determine whether that decree comports constitutionally with the aforesaid 1964 opinion. If it does, the Jackson circuit's decretal judgment of May 27, 1968 (now before us for review) should be affirmed. If not, that judgment should be reversed.

Now for the instant case. It was commenced January 28, 1959 in the Jackson circuit for injunctive relief against the same "activities"—occurring as alleged in Michigan —which in Virginia were considered by the Virginia courts and then by the Supreme Court. Decree for the State Bar having entered September 14, 1962, the *Brotherhood* appealed. As seen above, that appeal resulted in reversal and remand for further proceedings not inconsistent with the Supreme Court's opinion of 1964 *Brotherhood*.

On remand the State Bar did not avail itself of the accorded right to amend. It waited instead for disposition on remand of the *Virginia Case* and then, setting forth

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"It is submitted that the Supreme Court's opinion in the *Brotherhood* case, reflecting in its befuddling language the Court's lack of consensus, will prove of only transitory importance. However, it is hoped that it will speed the framing of clearer standards by which to judge practices similar to those advocated by the Brotherhood and sought to be regulated by Virginia. Thus, if the case reaches the Court again, little will be gained unless a definite choice is made between balancing and absolutism. It is also submitted that a balancing test is more appropriate."

the subsequent proceedings in the *Virginia Case* we have outlined, moved for entry of "a judgment in this cause in conformity to said Final Order of the Chancery Court of the City of Richmond, Virginia, as aforesaid."

Legal arguments followed, without additional proofs. The Brotherhood insisted and now insists that the Virginia decree does not conform with 1964 *Brotherhood*. The State Bar argued and argues here that the decretal judgment proposed by it and entered below May 27, 1968 conforms with the now-final Virgina decree. By-passing the Court of Appeals, we granted leave to review that judgment September 12, 1968. The appeal was submitted December 9 last.

First: Our decision will be understood better by making initial reference to a question posed and answer made by counsel during oral argument. Our answer is that when the Supreme Court denied certiorari to review 1964 *Brotherhood* that act made no precedent. Neither did it import an "expression of opinion upon the merits of the case, as the bar has been told many times" (Holmes, J., writing for the Court in *United States* v. *Carver* [1923], 260 U.S. 482, 490, 67 L. ed. 361, 43 S. Ct. 181). As written separately by Mr. Justice Frankfurter, upon denial of certiorari in *State of Maryland* v. *Baltimore Radio Show* (1950), 338 U.S. 912, 917, 94 L. ed. 562, 70 S. Ct. 252:

> "A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court."

This view, that no precedent results from denial of review, was written into our own jurisprudence as far back as 1935 (*Malooly* v. *York Heating & Ventilating Corp.*, 270 Mich. 240, 247. There it remains. See *Great Lakes Realty Corp.* v. *Peters* (1953), 336 Mich. 325, 328, 329, comment in *Williams* v. *City of Detroit* (1961), 364 Mich. 231, 288, and our order denying leave to appeal, *Frishett* v. *State Farm Mut. Automobile Ins. Co.* (1966), 378 Mich. 733, 734.

We proceed accordingly to determine whether the present Virginia decree and therefore the duplicative decretal judgment entered by the Jackson circuit,[4] are consistent with 1964 *Brotherhood*. No reliance may be placed upon the fact that, in 1967, the Brotherhood's petition for writ of certiorari was denied. The situation for us is the same as if the Brotherhood had filed no petition.

It is right to begin by saying that the adjudicatory result in Michigan *ought* to be the same as was reached finally in Virginia. Each suit as commenced, tried and reviewed has been purely equitable from the beginning. The subject matter of both is the extent to which the same planned activity of the Brotherhood comes within the constitutionally exercised jurisdiction of equity. It would reproach the tenet of equal justice under law if, in Virginia, the decree effective there should vary from the decretal relief which for our part is due to be made effective in Michigan. Starting from such premise, the thrust of which is a reasonable if rebuttable presumption that the Supreme Court is not apt to order that either the Brotherhood or our State Bar suffer or enjoy more in Michigan than do the corresponding antagonists in Vir-

4. See appendix.

ginia, we submit the following compendium of precise convictions reached by comparing *Brotherhood* as decided by the Supreme Court in 1964 with *Brotherhood* as finally settled in Virginia.

We find that the distinctive hub of 1964 *Brotherhood* turns upon desire of the Court, founded as that desire is upon the First and Fourteenth Amendments, that the Brotherhood remain free to help "injured workers or their families by recommending that they do not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood * * *." (footnote 9, 377 U.S. at 5). Further, although admitting some doubt from here on, we find thoughful comparison of the 1962 decree with the succeeding 1966 decree as entered successively in Virginia, that the highest court of that State has fairly eliminated such of the objections to the 1962 decree as were made by the Brotherhood and upheld by the Supreme Court. See the successive major excisions from the 1962 decree which Virginia's Supreme Court of Appeals directed, all italicized by the court and portrayed by footnote (4), 207 Va. at 187, particularly the elimination of the 1962 banning of solicitation.

The conclusion reached by the Virginia Supreme Court of Appeals reads (207 Va. at 189):

> "[2] We interpret the opinion as denying the State's right to restrain these activities. The Court held that the Brotherhood's activities fell within the protection of the First Amendment guarantees of free speech, petition and assembly. In the Court's opinion, the State had failed to show any appreciable public interest that would justify restraint of the Brotherhood's pursuit of constitutionally protected activities."

All this considered, nothing appears in the Supreme Court's opinion that declares or portends greater constitutional regulation of the practice of law than does the quoted interpretation of the Supreme Court's general if not possibly uncertain language.[5] We decline accordingly to impute to that Court intent that the Brotherhood of Railroad Trainmen should receive more First and Fourteenth Amendment protection than the State of Virginia now provides for it. Holding, then, that the Jackson circuit's decretal judgment of 1968 is in accord with the present Virginia decree, we align ourselves with that decree. In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia.

Second: The Brotherhood insists that the 1968 decretal judgment denies it the constitutional protection which, in *United Mine Workers of America* v. *Illinois State Bar Ass'n.* (1967), 389 U.S. 217, 19 L. ed. 2d 426, 88 S. Ct. 353, was accorded the *Mine Workers' plan* of hiring an attorney on a salary basis to represent its members and their dependents in connection with claims for benefits under the Illinois Workmen's Compensation Act. We do not agree. The narrow question in *Mine*

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5. No disrespect is intended. The 1965 writer for the Virginia Law Review may indeed have been right (ante at ——) in observing that the Supreme Court's opinion was couched to obtain some semblance of a consensus. If true, let it be noted that we too know all about that fact of judicial life and the occasional need it creates. See our recent contributory consension of generality signed by 4 Justices only, in the *Third Circuit Case,* December 8, 1969, 383 Mich. ——.

Workers was whether "the operative portion" of the scrutinized Illinois decree, prohibiting "any financial connection between the attorney and the Union," and such other parts of the decree as might be viewed as forbidding that "connection," passed muster under the First and Fourteenth Amendments. The Supreme Court ruled negatively and, as in 1964 *Brotherhood,* vacated the Illinois judgment and decree with remand for further consistent proceedings. The 1968 decretal judgment includes no such prohibition, nor does the Virginia decree of June 13, 1966.

Here we decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 *Brotherhood Case*—that only.

The 1968 decretal judgment, a copy of which we have appended, is affirmed. No costs.

Thomas E. Brennan, C. J.; Harry F. Kelly, J.; John R. Dethmers, J.;

Concurred with Eugene F. Black, J.

APPENDIX

(Decretal Judgment Entered May 27, 1968, by the Jackson County Circuit Court.)

"This court having heretofore and on the 14th day of September, 1962, entered its decree in favor of plaintiff and against defendants in this cause and said decree having been appealed to the Supreme Court of Michigan and having been remanded to this court for proceedings, not inconsistent with the decision of the United States Supreme Court in the case of *Commonwealth of Virginia ex rel Virginia State Bar* v. *Brotherhood of Railroad Trainmen,* and plaintiff having filed motion to enter judgment, to which motion a copy of said proposed judgment was attached and the court having heard the arguments of counsel, and having duly considered said motion and proposed judgment and being fully advised in the premises,

"Therefore, on motion of counsel for plaintiff, it is ordered and adjudged that defendants herein be, and they are now permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary,

commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."

ADAMS, Justice (dissenting).

This action was begun on January 28, 1959 by the State Bar of Michigan charging the Brotherhood of Railroad Trainmen, through the operation of its Legal Aid Department (subsequently renamed Department of Legal Counsel), with unlawfully and improperly soliciting large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen and directing those cases to Regional Counsel Henslee and associates in Chicago, Illinois.

The defendants admitted that in many instances, but not in all, a "member of the defendant Trainmen calls upon, contracts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained.

The issue as framed by Mr. Phillip C. Kelly, acting as attorney for the State Bar, was "whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal department."

On June 27, 1961, a hearing was held before the Circuit Judge at which time Mr. David J. Walsh, Supervisor of

the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, testified. The testimony of Mr. Walsh consisted of records of FELA claims compiled by the Association of American Railroads and tended to establish that during the period July 1, 1953 through the year 1960 there were 482 such cases and that 218 were handled by the Henslee firm.

Additional history of this case is contained in *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen* (1965), 374 Mich. 152, 132 N.W. 2d 78, and in the opinion of Justice Black upon this present appeal.

In *Brotherhood of Railroad Trainmen* v. *Virginia, ex rel. Virginia State Bar* (1964), 377 U.S. 1, p. 8, 84 S. Ct. 1113, p. 1118, 12 L. Ed. 2d 89, the United States Supreme Court said:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan *for advising workers who are injured to obtain legal advice and for recommending specific lawyers.* Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (Emphasis added.)

On December 5, 1967, the United States Supreme Court spoke again in the case of *United Mine Workers of America, District 12* v. *Illinois State Bar Association, et al* (1967), 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426. In that case the United States Supreme Court held (pp. 221, 222, 88 S. Ct. p. 355):

> "We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."

I agree with Justice Black that when the United States Supreme Court denied certiorari in 1967 to review *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar* (1966), 207 Va. 182, 149 S.E. 2d 265, that act made no precedent. I disagree with Justice Black that the decretal judgment entered May 27, 1968 by the Jackson County Circuit Court is consistent with 1964 *Brotherhood* or 1967 *United Mine Workers.*

Even if the decree could be sustained under the decision in *Railroad Trainmen,* it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers.*

I would vacate the judgment for the further reason that this is a chancery case in which the State Bar of Michigan seeks injunctive relief. The State Bar failed to amend or update its complaint upon remand by this Court and it failed to produce any proofs, other than the testimony of Mr. Walsh relating to the period from July 1, 1953 through the year 1960. Neither the trial court nor this Court should afford injunctive relief upon proofs as stale as these, the very most recent of which relate to a period 10 years ago. Furthermore, the evidence is wholly inadequate to sustain the injunctive relief which was granted.

We have repeatedly cautioned against granting injunctive relief prior to full hearing and clear and convincing proofs. See: *Cross Company* v. *UAW Local No.* 155 (AFL-CIO) (1963), 371 Mich. 184, 123 N.W. 2d 215; *School District for the City of Holland* v. *Holland Education Association* (1968), 380 Mich. 314, 157 N.W. 2d 206.

I would reverse the trial court and vacate the decretal judgment which it entered.

T. M. KAVANAUGH and T. G. KAVANAUGH, JJ., concurred with ADAMS, J.

APPENDIX E

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN,

Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of March in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable Thomas E. Brennan, Chief Justice; John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

52106

The State Bar of Michigan,

Plaintiff,

vs.

The Brotherhood of Railroad Trainmen, et. al.,

Defendants and Appellants.

This cause having been brought to this Court by appeal from the circuit court for the county of Jackson, and having been argued by counsel and due deliberation had thereon, IT IS NOW ORDERED by the Court that the judgment entered May 27, 1968 by the Jackson county circuit court be and the same is hereby AFFIRMED. It is further ordered that no costs be allowed.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of April in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,
vs.
THE STATE BAR OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,
vs.
THE STATE BAR OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This matter has been pending since January, 1959, with an original injunctive decree being entered in 1962 by the trial Court from which an appeal was taken by petitioner to the Michigan Supreme Court. However, before argument therein, this Court handed down its opinion in *Brotherhood of Railroad Trainmen v. Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, (1964).[1] Accordingly, with due regard

[1] This decision of this court will hereafter be referred to as *Trainmen.* Other decisions involving the Brotherhood of Railroad Trainmen will give the full title and reference to the official citation.

to the "ultimately controlling effect" of that decision, the case was remanded to the trial Court for further proceedings which were had in 1968 resulting in an injunctive decretal judgment in like terms and conditions as the final decretal judgment of the Virginia Courts after remand of *Trainmen* to the State courts of that Commonwealth. This controversy has had the full and deliberate consideration of not only the trial Court on two occasions but the Michigan Supreme Court and it is submitted that, as noted by the majority opinion of that Court, (App. E, p. 39)[2] the present decree, being in accord with the final Virginia decree must be considered as consistent with constitutional principles as laid down in *Trainmen* and with the other decisions of this court discussed *infra*.[3] Accordingly, respondent submits that the Petition for Writ of Certiorari herein should be denied.

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[2] References to the appendices immediately following the petition for writ of certiorari herein and appearing on pages 21-45 thereof will be indicated in this manner. References to that portion of the certified record consisting of the 478 pages of the printed Volumes I and II of the appellant's appendix filed in the Michigan Supreme Court will be referred to herein as R. App. p. 1a, etc. In reviewing the petition for writ of certiorari herein, we noted the references to the record appeared to be 17 page numbers higher than the numbers printed on the two volumes of the appendices filed with the Michigan Supreme Court. We inquired of petitioner's attorney if the certified record had been renumbered but received no helpful information, petitioner's attorney advising that he did not have a copy of the certified record with the page numbers indicated thereon. He accordingly suggested that we refer to the appendix as filed in the Michigan Supreme Court using the page numbers as printed thereon.

[3] *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) and *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967).

QUESTIONS PRESENTED

1. Does a State Court Injunction Restraining a Railroad Union from Certain Activity in Connection with the Recommendation of Certain Selected Lawyers to its Members in the Handling of F.E.L.A. Litigation, Which injunction is Duplicative of the Final Injunction in the Virginia Courts After Remand of *Trainmen*, Violate any Rights Guaranteed to the Union by the First and Fourteenth Amendments to the United States Constitution?

2. Does the Injunctive Judgment Entered in 1968 upon Remand from the Michigan Supreme Court in Light of the Decision of this Court in *Trainmen* Without the Taking of Additional Testimony Violate Due Process when the Prior Injunctive Decree, More Comprehensive in Scope, Entered After a Full Hearing, Contained Substantially all of the Injunctive Provisions Provided in the Later 1968 Injunction?

COUNTER-STATEMENT

The partial quotation appearing at the top of page 7 of the petition is misleading and is taken out of context. Rather, during the opening statement of counsel for Respondent (R. App. p. 69a), he indicated that it was his position that all of the allegations of the Bill of Complaint "Are admitted except as to paragraph 9 alleging that large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen residing in Michigan *** have been unlawfully and improperly solicited ***". Shortly thereafter, Respondent's counsel stated that he had concluded and "*** we are prepared to proceed with our proof under paragraph 9 which is in dispute" (R. App. p. 75a). On the following page, Respondent's counsel made the quoted

statement apparently by inadvertence as he follows this by stating "However we are ready to go ahead with proof if counsel does not want to make an opening statement." (R. App. p. 76a). He then proceeds to put the witness, David J. Walsh, on the stand who testifies to those matters (R. App. p. 78a-114a).

The trial Court's 1962 decision and decree did far more than prohibit the "Making of unsolicited calls" upon injured persons as is claimed on page 8 of the petition herein. The six respects in which the defendant was enjoined are set forth at R. App. p. 125a-126a. (See also the comparison of the six provisions of that decree with the 1968 decree appearing in footnote 5 on pages 15-16 hereof.) In the 1962 decree, the petitioner was restrained from (a) advising injured persons of their rights or doing other acts constituting the practice of law, (b) negotiating contracts of employment for legal services, (c) accepting money or gratuities from lawyers for obtaining legal employment, (d) making unsolicited calls upon injured persons to obtain legal employment for lawyers, (e) engaging in activity condemned by the Illinois Supreme Court in *In re Brotherhood,* 150 N.E. Rep. 2d 163 and, (f) conspiring with any person to violate the laws of Michigan or the Canons of Legal Ethics. (The latter provision is not involved in this case as such provision was not contained in the 1968 Decretal Judgment.)

ARGUMENT

I.

DOES A STATE COURT INJUNCTION RESTRAINING A RAILROAD UNION FROM CERTAIN ACTIVITY IN CONNECTION WITH THE RECOMMENDATION OF CERTAIN SELECTED LAWYERS TO ITS MEMBERS IN THE HANDLING OF F.E.L.A. LITIGATION, WHICH INJUNCTION IS DUPLICATIVE OF THE FINAL INJUNCTION IN THE VIRGINIA COURTS AFTER REMAND OF TRAINMEN, VIOLATE ANY RIGHTS GUARANTEED TO THE UNION BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

The conclusionary statements made by petitioner (P. 11) that the decree here involved was entered "*** with the purpose of interfering with the railroad workers in the exercise of their constitutional rights." and that the "equal justice under law" principle was accorded "the State Bar alone and never considered as applying to the union, Appendix E, p. 37" is wholly incorrect. Reference to Appendix E, p. 37-38 clearly shows that the opinion below recognized and started with the premise that this court "Is not apt to order that either the Brotherhood or our State Bar suffer or enjoy more in Michigan than do the corresponding antagonists in Virginia, ***". The basic fallacy in the entire argument and position of the petitioner is that the court below blindly adopted the decree approved by the Virginia Supreme Court in *Brotherhood of Railroad Trainmen v. Commonwealth of Virginia ex rel.: Virginia State Bar,* 207 Va. 182, 149 S.E. 2d 265 (1966) and although both the Virginia Supreme Court and the Court below recognized this court had held the respondent's basic plan must not be affected or forbidden and that the lawyers involved must be accorded "a like protection" both courts proceeded to ignore that admonition. The specific

holding of this Court in that regard is found in the penultimate paragraph of the majority opinion as follows:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge" (377 U.S. 1, 8).

Contrary to petitioner's position, neither the final 1965 Virginia decree nor the decree entered in this case infringe the rights protected as delineated in the portion of the opinion quoted above. And petitioner is likewise in complete error when it is stated on page 14 of the petition that the first injunctive provision prohibiting the "*** giving or furnishing legal advice to *** members or their families ***" is in contravention of the holding of this Court as set forth in the paragraph of the opinion quoted on that page of the opinion. The freedom guaranteed to railroad workers to gather together and to talk together freely as to the best course to follow in asserting their statutory rights under the Safety Appliance Act and the Federal Employers Liability Act and to advise concerning the need for legal assistance and to recommend lawyers to whom they can rely upon is not abridged nor is such activity prohibited under the above-mentioned injunctive provision. It only prohibits the Brotherhood from "furnishing legal advice" or in other words, practicing law.

Petitioner goes on (Pet. p. 14-15) to state in general terms that it also objects to each of the remaining five

injunctive provisions on similar grounds and contends that each can be misconstrued by the "railroads to strike at the heart of the plan. Each can be used to chill the exercise of constitutional rights." This fear is completely unfounded. By the same token, under the guise of protection of constitutional rights the organized Bar should not be handcuffed in any way in vigorously demanding that the canons of professional ethics and/or the provisions of the new ABA Code of Professional Responsibility should be complied with and that solicitation of actions proscribed by the Canons and/or Code be dealt with by appropriate disciplinary proceedings and/or injunctive relief.[4]

Petitioner, in effect, contends as it did before the Court below that the decretal judgment under consideration by the Court below and affirmed by that Court did not grant to petitioner "The full sweep of the constitutional rights delineated for the *Brotherhood* by the United States Supreme Court in *** 377 U.S. 1 (1964)." Petitioner contends that the Court below relied upon the Virginia Supreme Court's interpretation of this Court's decision in *Trainmen* rather than upon this Court's opinion itself and that there must be proven "substantial evils flowing from the peti-

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[4] While this case was pending before the court below, the Michigan Bar was severely criticized by the news media for failing to take action to curb the very practices which are prohibited in the injunction involved herein. Because of the pendency of this case before the Michigan Supreme Court, the respondent was hesitant to institute other actions until the court of last resort in Michigan had spoken on the matter in light of this court's decisions in *Button*, *Trainmen* and *Mine Workers*. Typical of such unfavorable publicity were headlines "Workmen's Compensation Abused—Multi-Million Claims Racket Charged". The news articles and editorials told of lawyers openly soliciting workmen's compensation claims and union personnel referring retirees to designated attorneys for the handling of claims. Since the decision of the Michigan Supreme Court on March 9, 1970, several injunction actions have been filed in the Wayne County Circuit Court against attorneys allegedly improperly soliciting workmen's compensation claims which has softened the news media hue and cry.

tioner's activities" before any injunction can issue. What petitioner is actually saying in making this argument is that the Virginia Supreme Court of Appeals misconstrued the holding of this Court in *Trainmen* which is not true. As a matter of fact, the Virginia Court went beyond the specific holding of this Court and struck down certain provisions of the injunction prohibiting solicitation which had been inserted by the Richmond Chancery Court. The Virginia Supreme Court held that the mandate of this Court prohibiting interference with the Brotherhood's program of recommending union selected counsel to handle members' death and disability claims arising out of employment did not permit drawing a line between solicitation and recommendation. See *Brotherhood of Railroad Trainmen v. Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966). Accordingly, the provisions against solicitation which were contained in the 1965 decree of the Richmond Chancery Court were deleted.

Petitioner's contention (Pet. p. 16) that the Court below while accepting "the Virginia opinion", indicated a lack of willingness "to accept this Court's mandate in *Brotherhood*" which is clearly unwarranted, is again the same contention that was made in the Court below that that Court, in effect, ceded "jurisdiction to the Virginia Court". On the contrary, the Virginia Court concerned itself completely in determining whether or not the injunctive provisions of the 1965 decree were consistent with the mandate of this Court as set forth in the majority opinion in *Trainmen*. That Court said: (207 Va. 186)

> "Our duty to obey the mandate of the Supreme Court is clear. In rendering a decision today, we cannot alter our course because of disagreement with Mr. Justice Black's characterization of the Brotherhood's practice of securing employment of union-selected counsel as an exercise of benevo-

> lence for the protection of union members and their families (377 U.S. at 2-4, 84 S. Ct. at 1114-1115, 12 L. ed. 2d at 91-92). Nor can we alter our course because of agreement with the prediction in Mr. Justice Clark's dissenting opinion: 'The potential for evil in the union's system is enormous and . . . will bring disrepute to the legal profession' (377 U.S. at 12, 84 S. Ct. at 1119, 12 L. ed. 2d at 96)."

The 1965 Virginia decree attempted to draw a line between solicitation and recommendation by prohibiting solicitation only and, in an effort to advise what was meant by "solicitation", the decree referred to source materials outside of the document, viz; the vast body of the common law, the statutes of Virginia and the canons of the American Bar Association adopted in that State. The Virginia Supreme Court recognized that by whatever term the activities of the Brotherhood should be labeled, even be it "solicitation", the mandate of this Court was that the Union should be free to pursue its established plan, and hence, the full thrust and, if you will, "breathing space" of this Court's decision was given full recognition by the Virginia Court. Accordingly, petitioner's contention that the Virginia Supreme Court opinion amounts to something less than the mandate of this Court is completely without foundation. The Virginia Court said in that case: (207 Va. 189)

> "But the Court's characterization of the Brotherhood's activities as 'recommending' does not justify the narrow interpretation advocated by the State Bar. The Court's opinion forbids restraint of activities held constitutionally protected. We must leave the Brotherhood free to pursue these activities, however they may have been characterized by the Supreme Court or may be characterized under Virginia law.

"As recognized in the opinion, the Brotherhood carries out its activities pursuant to an established plan. The plan is obviously designed to channel legal employment to lawyers selected by it. In carrying out the plan, the Brotherhood seeks out each injured trainman or a member of his family. It not only gives general advice about the wisdom of engaging counsel, but also recommends the employment of specific Regional Counsel selected by the Brotherhood.

"The Supreme Court expressly sustained the Brotherhood's objection to the restraint against its activities in 'soliciting or encouraging . . . legal employment . . . of lawyers (selected by the Brotherhood)'. While sustaining this objection, the Court recognized that the Brotherhood was asking protection from restraint of activities that admittedly resulted in the channeling of legal employment to particular lawyers. (See the language of Mr. Justice Black's opinion quoted in the fourth and fifth paragraphs of this opinion.)

"We interpret the opinion as denying the State's right to restrain these activities. The Court held that the Brotherhood's activities fell within the protection of the First Amendment guarantees of free speech, petition and assembly. In the Court's opinion, the State had failed to show any appreciable public interest that would justify restraint of the Brotherhood's pursuit of constitutionally protected activities."

It is submitted that Justice Carrico in his dissenting opinion spoke with candor when he stated:

"I do not agree that the labor union involved in this case should be permitted to solicit legal business for its sixteen regional counsel and I cannot believe that the United States Supreme Court ever intended such a result to ensue. ***

"The decree of the chancellor respects the union's recently declared right to advise injured workers to obtain legal advice and to recommend specific lawyers. The decree forbids solicitation. I would affirm the actions of the chancellor in those respects.

"I would leave it up to the Supreme Court itself to extend its ruling to permit the union to solicit legal business, if that was its intention in the first place. While my powers of prescience are no better than my abilities of clairvoyance, I believe that there is a good chance that the Court, if given the opportunity, will say that it had no such intention."

If this Court grants certiorari in this case, the "opportunity" will present itself to this Court to take a fresh look at *Trainmen* and the later decision in *Mine Workers* and perhaps hopefully this Court will forthrightly say that it had no intention in those decisions to sanction solicitation either on the part of a labor union or its members or its counsel.

Further there is no sound basis for the petitioner's contention that the decretal injunction in this case "grossly and erroneously" restricts the petitioner's constitutional rights contrary to the holding of this Court in *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) (Pet. p. 16-17). On pages 15-16 *infra,* in footnote 5 are set forth the seven injunctive provisions in the decree below with comparable provisions of the former 1962 decree. To demonstrate that these provisions do not contravene the holdings of this Court in either the *Trainmen or Mine Workers* cases, we set forth seriatim the true extent of each of the seven injunctive restraints with the reasons why they do not violate the decisions of this Court under the aforementioned cases:

a. *Furnishing legal advice:*—The Supreme Court held that the conduct of a union in advising its mem-

bers of the advisability of consulting particular legal counsel was constitutionally protected. The Court did not authorize the union or any of its members to themselves practice law by giving or furnishing legal advice.

b. *Informing lawyers that an accident had happened and furnishing the names and addresses for the purpose of obtaining legal employment:* —The Supreme Court held that the union could advise its members to consult specific attorneys or could itself retain an attorney to represent those of its members needing legal services. The decision of the Court contemplates that, having been advised of the desirability and availability of counsel, each union member would himself decide whether to avail himself of such service. The Court did not sanction the dissemination by the union of the names of injured members to attorneys in order to facilitate mass solicitation of claims from those members, who having been apprised of the availability of the service, do not desire to avail themselves of it.

c. *Suggesting that a recommended lawyer will defray expenses*:—The Supreme Court held that the union could properly recommend to its members that they employ specific attorneys where such recommendation was predicated upon the expertise which, in the judgment of the union, these selected attorneys possessed. The Court did not sanction arrangements between the union and the recommended attorneys to induce the members to retain a particular attorney solely because one attorney was prepared to furnish improper and unethical financial benefits to a prospective client which another practitioner would not.

d. *Controlling the fees charged:* —The Supreme Court held that the union could properly retain an attorney to represent its members by paying him a salary so that no member would be charged a fee. The Court did not sanction control by the union of any fee to be charged by the attorney. Indeed, the Court did not sanction any interference by the union in any attorney-client relationship arising between the attorney and the union member. Contrary to petitioner's assertion, retaining any attorney on a salary basis by the union is not an example of ultimate control of the fee but rather total elimination of all fees. Thus, in such a circumstance, the member receives the recovery in full without one cent deducted for attorney's fees.

e. *Accepting compensation for solicitation:* —The Supreme Court held that acceptance of a retainer by an attorney stemming from the proper activities of the union was constitutionally protected and that no action could be taken against the attorney. The Court below did not sanction conduct by the attorney which was itself unethical and it, specifically, did not sanction any payment by the attorney to the union in return for its recommendation to its members that he be retained.

f. *Sharing in legal fees:* —The Supreme Court held that acceptance of a retainer by an attorney stemming from the proper activities of the union was constitutionally protected and that no action could be taken against the attorney. The Court did not sanction conduct by the attorney which was itself unethical and it, specifically, did not sanction the splitting of the attorney's fee with the union or any other lay agency in exchange for its recommending that his services be employed, conduct which would merely constitute a

sophisticated form of paid solicitation of cases by the attorney.

g. *Sharing in any recovery:* —The Supreme Court held that the activities of a union in recommending the hiring of specific legal counsel or the retaining of an attorney on a salary basis to represent members of the union, motivated, as indicated in the record, by a genuine concern on the part of the union for the welfare of its members, are a constitutionally protected form of free speech. The Court did not sanction such conduct where it was motivated by the union's desire to supplement its treasury and, consequently, was not related to an exercise of the constitutional privilege of free speech. Specifically, the Court did not sanction any conduct by the union, involving, as a condition for its recommendation to its members that one or more particular attorneys be employed, that the union ultimately share in any recovery received by the injured or deceased member.

II.

DOES THE INJUNCTIVE JUDGMENT ENTERED IN 1968 UPON REMAND FROM THE MICHIGAN SUPREME COURT IN LIGHT OF THE DECISION OF THIS COURT IN TRAINMEN WITHOUT THE TAKING OF ADDITIONAL TESTIMONY VIOLATE DUE PROCESS WHEN THE PRIOR INJUNCTIVE DECREE, MORE COMPREHENSIVE IN SCOPE, ENTERED AFTER A FULL HEARING, CONTAINED SUBSTANTIALLY ALL OF THE INJUNCTIVE PROVISIONS PROVIDED IN THE LATER 1968 INJUNCTION?

The contention that the decretal injunction in this case is not based upon the pleadings and is not supported by proofs and accordingly, offends "constitutional guarantees of due process" is likewise without foundation.

At the outset, it should be noted that the original decree in this case entered by Judge Dalton in 1962 restrained the defendants from six specific types of activities designated a. through f. which are set forth on pages R. App. p. 125a-126a herein. This decretal order was based upon evidence introduced during the trial and confirmed by findings of the trial judge in his decision (R. App. p. 118a-121a) and the findings contained in the decree (R. App. p. 121a-124a). Encompassed within five of the six restrained activities are all of the specific acts restrained in the 1968 decretal judgment. (See the analysis and comparison of the provisions of the two decrees in footnote 5 below.) Ac-

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[5] *1968 Decretal Judgment*

(Full text at R. App. p. 443a-444a)

1. Giving or furnishing legal advice to its members or their families.

2. Informing any lawyer or lawyers that an accident has been suffered by a member or nonmember of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer.

1962 Decree

(Full text at R. App. p. 121a-126a)

a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan;

b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;

d. Making unsolicited calls upon any person for the purpose of soliciting contracts for the employment of a lawyer***;

e. Engaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in *In Re Brotherhood of Railroad Trainmen*, 150 Northeastern Reporter 2nd, 163.

(continued on next page)

cordingly, not only were there appropriate pleadings but the evidence advanced at the trial resulting in the original findings and decree were adequately sufficient to support the later decretal judgment. Appellee submits there was no failure to provide appellants with the traditional requisites of procedural due process, viz; notice, the right to be heard and a resolution of the matter in a manner consistent with essential fairness.

The cases cited by petitioner on page 18 of the petition in support of the contention that "Even where there has been proof of the commission of unlawful acts, other unlawful acts disassociated from those proven should be stricken from an injunction decree." are not in point on

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(continued from preceding page)

3. From stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim.	e. See text of e. above.
4. Controlling, directly or indirectly, the fees charged or to be charged by any lawyer.	b. and e. See above for texts of b. and e.
5. From accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise.	c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services; and e. above.
6. From sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any laymen or lay agency.	c. and e. See above for texts of c. and e.
7. From sharing in any recovery for personal injury or death by gift, assignment or otherwise.	c. and e. See above for texts of c. and e.

the issue here. In none of those cases was the issue of constitutional procedural due process involved. Rather, the question there was the propriety of the scope of the injunction in light of the record made at the trial. The crux of the decision in *State of Wyoming v. State of Colorado* 286 U.S. 494, 76 L. Ed. 1250 (1932) is found under Headnote 3 on page 508 where the following appears:

> "No showing appears to have been made indicative of any occasion at that time for a broader injunction. Of course, in the absence of such showing, a broader injunction was not justified."

In *N.L.R.B. v. Express Publishing Company* 312 U.S. 426, 85 L. Ed. 930 (1941), this Court had under consideration the power of a federal court to restrain acts in violation of the National Labor Relations Act. On page 435-436, this Court said:

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the Court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a Court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation *unlike* and *unrelated* to that with which he was originally charged." (Emphasis supplied.)

The same question was before this Court in *Communication Workers of America, AFL-CIO v. N.L.R.B.* 362 U.S. 479, 4 L. Ed. 2d 896 (1960) in which case this Court said:

> "It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an

> authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

Likewise, *In Re Ruffalo* 390 U.S. 544, 20 L. Ed. 2d 117 (1968)* involves a disbarment proceeding wherein the principal charge upon which the respondent attorney was found guilty and disbarment ordered was added to the specification of charges during the course of and on the third day of the trial. This Court stated in the opinion: (p. 551)

> "*** The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."

This factual situation is far removed from that existing in the instant case. Likewise, in *Willner v. Committee on Character & Fitness* 373 U.S. 96, 10 L. Ed. 2d 224 (1963) Willner was denied admission to the Bar of New York for failure to obtain a favorable certificate from the Character & Fitness Committee of the Appellate Division of the New York Supreme Court. No hearing was had at which Willner could be confronted by witnesses or evidence produced against him. After several petitions by Willner to the Appellate Division of the New York Supreme Court in each of which the decision of the lower Court was affirmed without opinion, he appealed to this Court arguing that "He had been denied his constitutional rights in that he had been denied confrontation of his accusers and that, in spite of the repeated attempts, he could not be sure of the

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* This case is erroneously cited in the petition (p. 19) as 20 L. Ed. 117.

committee's reasons for refusing to certify him for admission" (373 U.S. 102). This Court held that petitioner was denied procedural due process when he was denied admission to the bar by the Appellate Division without a hearing on the charges filed against him before either the committee or the Appellate Division. This is not the case here.

CONCLUSION

For the reasons above stated, respondent respectfully submits that the petitioner's Petition for Writ of Certiorari in this case be denied.

Respectfully submitted,

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August 20, 1970.

FILE COPY

SEP 19 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioner,

v.

THE STATE BAR OF MICHIGAN,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Our petition for certiorari sets forth fully the reasons for granting the writ. The Brief in Opposition can be read in several ways, including the interpretation that it does not oppose the granting of the writ. In any event that brief does not constitute any answer to the petition. Since this is so, this reply will merely underscore the basic errors in that brief's attempt to defend the indefensible.

1. Respondent spends some time in its "preliminary statement" and its "counter-statement" referring to the facts involved. It renders a discussion of those facts somewhat complicated by developing its own method of

citation to the Record in its second footnote. Our Petition cited to the Record as prepared by the Clerk of the Supreme Court of Michigan. As respondent knows, this results in citations to the 2 volume printed appendix filed in the Michigan Supreme Court being numbered 17 pages higher. Counsel for respondent was so informed by this counsel but now complains that it did not understand the information. The renumbered record filed with the Clerk of this Court was, of course, available to respondent. In answering respondent's citations, we set out both methods of citing to the Record.

Respondent's statement of the "facts" make one doubt that it has read the Record. The Opinion in 1965 by the Supreme Court of Michigan (App. C. pps. 26, 27) was reached after the 1964 *Brotherhood* decision by this Court, but only after a full argument subsequent to the filing of additional briefs by both parties stating what they believed the effect of this Court's decision was. After those events, the Supreme Court of Michigan remanded with "leave to file an amended Complaint." Respondent's statement that the remand was for "further proceedings" is a misrepresentation of the Opinion consistently advanced by it after remand.

Respondent's "other facts" are similarly objectionable. Its attempt to justify the relevance of the only witness it presented again shows that it believes that it is entitled to an injunction because it has proved a "system of unethical or illegal solicitation" despite the fact that this Court in 1964 *Brotherhood*, and every court subsequent thereto, held that the *Brotherhood* plan does not involve any "solicitation." Because of the grossness of the basic error in stating the facts of this matter, it is clear that the opposition to the writ must fail because of a lack of foundation.

We wish to take this opportunity to call the attention of this Court to an obvious error in page 10 of our Petition where the merger into the United States Transportation Union is stated to have been consummated on January 1, 1959 rather than on the proper date of January 1, 1969.

2. Respondent's attempt to justify the injunction results in statements approaching the ludicrous as well as in a complete abandonment of the majority opinion. The quality of that contention can be judged by the fact that it quotes 3 paragraphs from the dissenting opinion in the Virginia Supreme Court of Appeals (Opp. pps. 10, 11). We also note that respondent relies again on newspaper articles in this Court (Opp. footnote 4, p. 7) as it has done since the beginning of this case (R. 71, R. App. 54a). In the last oral argument in the Michigan Supreme Court, counsel for the State Bar was told by the Court not to quote newspaper articles and not to base its argument on those articles. It is not surprising that its brief is based upon such a foundation nor that it should, as a result, have the consistency of a marshmallow.

Not surprisingly, the State Bar in its first point (Opp. pps. 5-14) argues that the union has been fully accorded its constitutional rights under the First and Fourteenth Amendments. However, the reason for that conclusion is quite unclear. Its argument to that effect is, however, noteworthy for its only mention of the Majority Opinion below (Opp. p. 5). Incredibly, that single mention is made in order to assert that the decision below was based on the "premise" that this Court would require that like injunctions be entered in Virginia and in Michigan. Such "premise" is non-existent when the entire opinion below is considered. The thrust of the Majority Opinion is clearly and correctly set out in the Petition.

Respondent later creates a second credibility gap when it states that the ". . . Virginia Court went beyond the specific holding of this Court . . ." in *Trainmen* v. *Virginia*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964). To the contrary, the gist of the Virginia Opinion shows a grudging acceptance of this Court's authority. Petitioner, of course, contends that the Virginia Court erred and acted upon its belief by subsequently petitioning for Leave to Appeal from the entry of the Virginia Decree, which Petition was denied on technical grounds (See, Pet. p. 13).

Respondent's argument is further noteworthy in that it, for the first time, states what it believes to be the meaning of the Decree. Heretofore, the State Bar urged its entry and later its affirmance as being in "conformity" with Virginia. [Indeed, the Bar went so far as to urge, in the trial court, that *Mine Workers* v. *Illinois Bar*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) could not be considered there because of ". . . a specific direction as to amending . . ." the Decree. R. 492, R. App. p. 475a]. Respondent's analysis of the Decree, however, creates new confusions as to its meaning thereby confirming our contention that the Decree would hinder and hamper the union in the exercise of its constitutional rights.

In its analysis, respondent states that the first provision prohibits the practice of law by means of the giving or furnishing of legal advice. That statement, of course, flies squarely in the face of the specific language of this Court's Opinion quoted at page 14 of our Petition. Moreover, it ignores completely the fact that no such claim was made in the Complaint. Indeed, statements made by laymen that a person has a good claim are mere state-

ments of opinion and are not the giving of legal advice nor the practice of law. This is especially so since the union's plan here intends, at the termination of the advice, that the member have his claim handled by the union lawyer. Indeed, Ethical Consideration 2, of Canon 2 of the new Code of Professional Responsibility adopted by the American Bar Association states that the legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.

Respondent's statement as to the second injunctive provision conjures up a situation neither charged in the Complaint nor existing in reality. It is said that the provision would prohibit the later mass solicitation of claims by lawyers from members who have rejected the union's plan. This statement, of course, contradicts Virginia's interpretation of that provision in modifying it to its present form. That Court stated that the Decree acted solely against lawyers who were soliciting for themselves individually and outside the operation of the *Brotherhood* plan. There is, however, some similarity between the respective analyses in that neither analysis deals with evidence or reality.

The third provision is analyzed as prohibiting the offering of "unethical inducements." Again, there was no claim that such inducements were offered and this analysis flies in the face of the specific wording of the provision which prohibits the suggestion that any expenses or advancements would be defrayed by the lawyer pending the settlement of the claim. The provision would prohibit perfectly proper payments, as well as those payments questionably unethical, presumably on a National basis rather than on a basis limited to Michigan, or perhaps to Virginia.

The fourth provision of the decree prohibits the controlling, either directly or indirectly, of the fees charged by a lawyer. Respondent states that the *Mine Workers* case, where the lawyer is on a salary, is not the controlling of fees but is, instead, the elimination of fees. This sophistry is typical of the rationalizations advanced by the State Bar. In the provision discussed next above, the State Bar candidly complained of "unfair competition." The only reason the controlling of fees has been prohibited anywhere is because of the same allegedly "unfair competition." The total elimination of a fee, of course, renders fee competition impossible and is the ultimate in control of the fee as asserted in our Petition.

The remaining 3 provisions of the decree relate to a supposed profit obtained by the union through the operations of its Legal Services Plan. Suffice it to say that such financial connections are not based on charges, or evidence, and were included in the decree solely because of the Virginia Court's unwillingness to strike any of the Findings of Fact entered in the original 1962 Decree, or any of the injunctive provisions of that Decree except where the striking of the injunctive provisions was specifically required by the Opinion of this Court. The *Mine Workers* decision, for reasons set out in our Petition, prohibits any decree against financial connections even if there were some evidence in the Record to support it. The trial court originally dragged in a provision along these lines which it obtained from *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) though it recognized that such matter was neither pleaded nor proved (R. 138, R. App. 121a). Referring to source materials outside the Decree is, of course, objectionable as was recognized by the Virginia Supreme Court of Ap-

peals in its Opinion and as accepted by respondent in its Brief (p. 9).

Nothing contained in respondent's first point constitutes an answer to our Petition. Respondent states that we contend that there must be proof of "substantial evils" before an injunction can issue. No such claim is made by Petitioner. The test is correctly stated in this Court's *Trainmen* decision at 377 U.S. 8. There, as here, "the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."

3. Respondent also fails to answer the Petition for Certiorari in its second point. There, it claims that the 1968 judgment is either identical to or a paraphrasing of the specific acts of 5 of the 6 provisions contained in the 1962 Decree which was reversed by the Michigan Supreme Court. (The 6th provision prohibited the union from conspiring with lawyers to violate either the laws as to the practice of law or the canons of ethics of the State of Michigan.) Therefore, it is argued Petitioner had its hearing in June of 1961 on the provisions of the 1968 decretal judgment. That argument, of course, proves too much for, on the same premise, it could also be contended that the 1962 Decree should have been re-entered. Moreover, it is submitted that this is surely not the kind of notice, hearing and "essential fairness" contemplated by the requirement of procedural due process. Especially is this so when the provisions were so stale and the 1962 injunction was primarily based on the pleadings. Furthermore, the Court in 1962 rejected the union's defense that it had complied with the *Illinois* decision on the ground that the defense was "indefinite and uncertain in rela-

tion to the practices complained of" (R. 135, 136, R. App. 118a, 119a). Proof as to the events of the intervening years would, of course, have relieved entirely this conjectural "indefiniteness and uncertainty."

The remainder of respondent's argument is equally unfounded; the State Bar's nit-picking does not distinguish the cases cited in the Petition. It is respectfully submitted that those cases remain applicable for the propositions for which they were cited in our Petition.

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted and, after the granting of the writ, the judgment and Opinion of the Supreme Court of Michigan should be reversed, per Curiam, without remandment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioner,

v.

THE STATE BAR OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The first opinion of the Circuit Court for the County of Jackson filed on September 12, 1962 (A. 109) is unreported. The first opinion of the Supreme Court of Michigan (A. 170) is reported at 374 Mich. 152, 132 N.W. 2d 78. The second opinion of the Jackson Circuit Court entered after remand (A. 173) is unreported. The second opinion of the Michigan Supreme Court and the dissent thereto (A. 205) is reported at 383 Mich. 201, 174 N.W. 2d 811 (1970).

JURISDICTION

The judgment of the Supreme Court of Michigan (A. 220) was entered March 9, 1970. The union's duly filed Petition for Rehearing was denied on May 4, 1970 (A. 222). This Court has jurisdiction of this cause under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Does a State Court injunction conflict with rights guaranteed to railroad trainmen union members under the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins such members from acts arguably involved in the union's basic plan affording its members the opportunity to accept or reject union counsel to represent them in personal injury or death claims under the Federal Employers' Liability Act?

2. Is the granting of such an injunction prohibited by the decisions of this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967)?

3. Does the granting of that injunction necessarily based upon a Complaint filed in 1959 and on evidence heard in 1961 enjoining acts never pleaded nor proved primarily because the Virginia Courts had entered a similar injunction, deprive Petitioner of procedural due process?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statute involved is §28.642 of the Michigan Statutes. That part relied on (A. 10) by the State Bar provides:

> "Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership association or organization of any kind, either incorporated or unincorported, or of any division, bureau of committee of such association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor * * *"

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States which provide as follows:

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

a. The Relevant Pleadings and how the Constitutional Questions were Raised.

This action was commenced on January 28, 1959 (A. 5). The essential thrust of the Complaint is stated in paragraph 5 (A. 7, 8) charging the defendants with engaging in a "well-organized and systematized solicitation" of FELA Claims. Defendant union denied the characterization and alleged that it was in full compliance with the decision of the Supreme Court of Illinois from which the State Bar had obtained the factual material which it alleged. As a result of that decision, *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d, 163 (1958), the president of defendant union sent a letter ordering all union counsel to comply therewith on or before April 1, 1959. A copy of the order of the president was set out in the First Affirmative Defense of the Brotherhood (A. 167).

The Complaint based its right to an injunction on a Michigan Statute declaring "solicitation" to be a misdemeanor. Defendant union denied its application and

contended that any application of that statute to apply to its plan of referring members to union counsel would be contrary to rights granted the *Brotherhood* under the Federal Constitution (A. 18).

Plaintiff sought an injunction permanently enjoining the Brotherhood of Railroad Trainmen in only one respect, specifically from engaging in the solicitation of Federal Employers' Liability Claims in the State of Michigan (A. 11). Plaintiff similarly claimed that it was entitled to an injunction against "solicitation" in its statement of claim (A. 29, 30).

Defendant Brotherhood in its Concise Statement of Defense stated, among other things, that the State Bar was attempting to enjoin the Brotherhood on the basis of selected statements from the Illinois Supreme Court Opinion alleged as facts though the allegations were based solely on information and belief; that there was no violation of the Michigan statute; and that the Brotherhood's Plan was protected by rights granted by the Constitution of the United States of America, by federal statutes, and by considerations of public policy (A. 31-33).

b. The Trial and the Exhibits.

On June 27th, 1961 the trial opened with counsel for the parties present (A. 34). The first 34 pages of the 86 page transcript of this trial are occupied with an Opening Statement for the State Bar consisting largely of exchanges between counsel and statements as to the allegations which were admitted. (A. 34-62).

Near the close of the Opening Statement, counsel for the State Bar said:

> "* * * We haven't offered *any proof as to disputed matters.* We do not intend to. * * *" (Italics added (A. 61)).

The State Bar offered as its only witness David J. Walsh (A. 62) who testified that he was Supervisor of the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, which is comprised of railroads operating in the United States. The records of the Association of American Railroads had been kept under his supervision since July 1, 1953. and it was the regular course of his business to keep the records (A. 63). He had with him the records of FELA claims of Michigan residents (A. 64).

On Michigan FELA cases reported from July 1, 1953 to March 31, 1955, the Brotherhood's counsel objected on the ground that they were incompetent, irrelevant and immaterial. To this objection counsel for the State Bar replied that:

> "The *only issue* in this case as we see it * * * is whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal aid department. That is placed in issue in our bill and denied by the answer, and this is evidence offered in support of the bill." (A. 64). Emphasis supplied.

The cards testified to came from unidentified sources but were admitted in evidence. Other cards were admitted based on reports made to the organization of the witness, the Claims Research Bureau, during periods from July 1, 1953 through December 31, 1960. On cross examination, the witness testified that he had no personal knowledge of the material contained in the cards.

After its motion to dismiss was denied at the close of the plaintiff's case, the defendant rested.

c. The 1962 Decision and Decree.

The trial court's decision (A. 109-112) held that the "* * * recommendation of counsel by the Brotherhood is the nub of the proceedings * * * the right of freedom of speech being basically involved" (A. 111). The injunctive provisions of the Decree enjoined the Brotherhood in six respects relating to the procurement, within the State of Michigan, of a lawyer to render "any" legal services (A. 117-118). These injunctive provisions essentially prohibited the making of unsolicited calls upon a "person" or his representative for the purpose of arranging for the employment of a lawyer or for the purpose of furnishing a lawyer to such person or representative.

d. The Mandate of the Michigan Supreme Court.

The 1962 Decree was appealed but before argument this Court handed down it Opinion in *Brotherhood of R. Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). The Michigan Supreme Court, after argument, remanded to the Circuit Court stating (A. 449) at 374 Mich. 152, 132 N.W. 2d 78, 79 (1965):

> "Now that the Supreme Court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson Circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.
>
> "Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

e. Proceedings on Remand.

After remand, a motion was made for further proceedings by the State Bar (R. 450). This motion was heard on February 5, 1965 with counsel for the State Bar stating: "The plaintiff does not care to amend the Complaint. . . ." Defendant insisted upon the amendment of that Complaint and the matter was taken under advisement (R. 472-483), with briefs being filed on both sides. No ruling was ever made on that motion.

In April of 1968, a motion for judgment was made (R. 454-456). The hearing was had on May 3, 1968. The State Bar urged the adoption of a Decree entered in the State of Virginia after remand by the United States Supreme Court (R. 483). In response, the Brotherhood stated that the mandate of the Supreme Court of Michigan required the filing of a new Complaint; that the Decree was contrary to the *Brotherhood of Railroad Trainmen decision*, and that the *United Mine Workers* case handed down by the United States Supreme Court in December of 1967 was also directly relevant (R. 484). The trial court denied these contentions of the *Brotherhood*. It entered its Opinion and Order, and Decree on May 24, 1968 (R. 458-461).

In that Opinion, the court dismissed all of the individually named defendants and entered its Decree against the *Brotherhood of Railroad Trainmen* and all of its members, agents and officers in the State of Michigan (R. 459). The court stated that the Supreme Court of Virginia had modified the Decree entered on remand by the Virginia trial court in *Brotherhood of R. Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966). The court distinguished the *Mine Workers* case as being limited to the

hiring of attorneys on a salary basis and stated that its Decree was in conformity with the interpretation of the Supreme Court mandate as made by the Virginia Supreme Court (R. 459).

On appeal the Michigan Supreme Court affirmed the 1968 injunction. In its Opinion, (R. 497-511) the Michigan Supreme Court, while indulging in language which is most turgid, appears to hold that it was compelled to affirm the decree because it is similar to a decree affirmed as modified by the Virginia Supreme Court of Appeals at 207 Va. 182, 149 S.E. 2d 265.

The Brotherhood of Railroad Trainmen and other national railway operating unions were negotiating with a view towards merging while plaintiff was moving for judgment in this case. Since the Decree was entered, a referendum vote was held among the membership of the organizations and on January 1, 1969, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union, along with the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. Petitioner is the successor union.

SUMMARY OF ARGUMENT

I.

The judgment below interferes with the Petitioner's plan of providing counsel for its members. It thereby seriously restricts the Petitioner's rights of freedom of speech and freedom of assembly, even though those constitutional rights in the operation of its legal services plan were confirmed by this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964).

The court below wrongly placed the burden on the union to prove a "specific order forwarded from Washington." The proper test as established by this Court's decisions required the State to prove "substantive evils" flowing from the operation of the plan before it could claim a substantial regulatory interest.

The Decree is defective because it lacks the precision constitutionally required. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The reliance of the court below on the Virginia Supreme Court of Appeals was unjustified. That court decided the case upon the narrowest rational consideration of this Court's Opinion and mandate. Furthermore, it failed to consider the pleadings, the evidence, or the Decree, relying instead upon a hypertechnical "rightness" of the portion of the Decree remaining after reversal by this Court. This "rightness" was held to result from the denial of the first petition for leave to appeal in that case. Many other untenable distinctions were drawn by the Virginia courts. The Michigan Courts surpassed Virginia in the drawing of unwarranted distinctions.

The superseded 1962 Michigan injunction was based on *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). Sections of that Opinion favoring the union, however, were rejected. The 1962 injunction was reversed by the Michigan Supreme Court because of this Court's 1964 Brotherhood Opinion with permission granted the State Bar to amend the Complaint. On remand, the State Bar refused to amend. In 1965, a motion was made for further proceedings. This motion was never ruled on. In 1968, the State Bar tendered the injunctive provisions of the modified Virginia decree. The union again insisted that an amended complaint was required. That contention was rejected and the decree was entered and affirmed by the court below. That court stated that it was not willing to grant the Brotherhood more relief in Michigan than it had obtained in Virginia and erroneously held that this Court's decision in *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) was not applicable.

A detailed examination of each of the injunctive provisions confirms their unconstitutionality. The first provision would stifle all statements by union members when read as written. Read otherwise, it is without foundation. The second provision is unintelligible. The Virginia Supreme Court interpretation is specifically designed to strike at the lawyers cooperating with the Brotherhood plan. On the other hand, the State Bar's reading, that "mass solicitation of claims" after rejection of legal counsel is prohibited, is pure gossamer. Moreover, the provision conflicts with Canon 2, of the Code of Professional Responsibility. That Code permits legal services plans only to the extent constitutionally permissible. It is, therefore, important that this Court not permit constitu-

tional rights to be hamstrung by the drawing of hypertechnical distinctions.

The third provision prohibits statements about advances. It is not limited to inducements to a retainer. It is also completely unfounded. Illinois counsel are permitted to make such advances after retainer, *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 121 N.E. 2d 865, 872 (1954). Such advances, if made, are not part of the union's plan.

The fourth provision prohibits the controlling of fees. This control is no longer exercised.

The 3 remaining provisions relate to a supposed profit by the union. Each is unfounded. Moreover, the union in the past never made a profit from such practices; payments being purely for reimbursement.

This Court's mandate in 1964 Brotherhood requires the reversal of the judgment below. When *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426 88 S. Ct. 353 (1967) is analyzed, it is seen that it more specifically compels reversal. The financial connection permitted there is similar to those prohibited here. This Court's decisions in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State* Bar, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967), when considered in the light of the irrelevant statements of the court below, and in the light of the lack of evidence at the only hearing in the case, clearly compels reversal.

II.

The opinion and judgment below was based upon acts not pleaded or proved and as to which Petitioner never had a hearing. Such conduct deprived the Petitioner of its constitutional right of procedural due process.

The cause, when begun, was based upon a paraphrase of some factual statements made by the Illinois Supreme Court in re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). It was also based upon 28.642, Michigan Statute Annotated, prohibiting solicitation. The theory of the State Bar was solely based upon the allegation that the Brotherhood's plan of contacting injured members constituted illegal solicitation. This was the only contention made in its opening statement at the hearing or throughout that hearing.

Findings as to solicitation and as to the applicability of the Michigan Statute were the only findings made as part of the 1962 Decree. The injunctive provisions of that Decree are not related to the findings of fact. The 1962 Decree, when compared with the 1968 Decree, is the more specific. The 1962 Decree does not support the entry of the 1968 Decree and the contention to the contrary is erroneous.

The 1968 Decree omits the findings contained in the Virginia Decree and contains no findings. The Michigan Statute cannot be the basis of any decree because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). A statute which prohibits a simple referral to a lawyer as "solicitation" is

constitutionally impermissible. The latest proofs deal with events in 1960. Those proofs are cards supplied by railroads. The only witness testified that the Association of American Railroads had investigators in Michigan since 1953.

The defense of compliance with the Illinois decision was erroneously rejected by the Chancellor in 1962. The Illinois decision has been superseded by this Court's constitutional decisions. If it is assumed, contrary to the fact, that there was some proof of unlawful acts, it is nevertheless clear that other disassociated unlawful acts should be stricken from the Decree. *State of Wyoming* v. *State of Colorado,* 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company,* 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB,* 362 U.S. 479 (1960).

Mere lack of proof does not raise questions of constitutional due process but complete, or almost complete, lack of proof does raise such an issue as does the taking of statements from other court decisions for use in the issuance of a present injunction. The changing of the burden of proof in the course of a proceeding also raises that issue. The proceeding was instituted on particular charges and the judgment was issued on charges not originally made. It, therefore, deprived the Petitioner of procedural due process. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

If charges had been made procedural due process would have required a hearing. The failure to grant a hearing renders the judgment invalid. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963).

ARGUMENT

I.

THE MAJORITY OPINION AND JUDGMENT SERIOUSLY RESTRICTS THE PETITIONER'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND IS CONTRARY TO RELEVANT DECISIONS OF THIS COURT.

The 1968 decretal judgment (A. 176; 383 Mich. 201, 174 N.W. 2d 811, 815, 816) necessarily interferes with the operation of the union plan of recommending union counsel to its members. Though the practice under that plan admittedly resulted in the channeling of legal business to the Brotherhood lawyers, this Court, nevertheless, approved the basic plan. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964). Despite the prior rulings of this Court, the decretal judgment causes the union members in Michigan to be faced with the possibility of a contempt citation if they misinterpret the meaning or effect of the vague injunctive provisions. Such threat chills the exercise of the constitutional rights already confirmed by this Court and on a record where there is no evidence of any substantive evils justifying any of the injunctive provisions. It is exactly these types of provisions that this Court addressed itself to when it stated in 1964 that:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by

> Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7.

The primary reason asserted by the majority below for its affirmance of the decretal judgment is that: :

> "In short, this Court is not ready——absent a specific order forwarded from Washington——to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia."[1]

(A. 214; 383 Mich. 201, 174 N.W. 2d 811, 815). It is submitted that this test is the reverse of the test required by the decisions of this Court. Contrary to the Opinion below, the burden is on the State Bar to prove that the injunction is necessary; it is not on the union to prove that it is entitled to "more relief" here than in Virginia.

When the test utilized by the court below is considered, it is understandable why the Majority Opinion devotes so much attention to the effect of this Court's denial of the Petition For Certiorari from the 1966 Judgment of the Virginia Supreme Court of Appeals. (Some of this attention may be caused by the erroneous belief that the Brotherhood, rather than the Virginia State Bar, sought certiorari). If the denial of that certiorari had the effect of approving the decree, the Michigan Supreme Court could have eliminated the latter half of its Opinion. Since it correctly found that the denial of certiorari had failed

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1. This state of mind in turn is founded upon a holding that the "pleadings, factual record and judgment" are "substantially duplicative" in the two states and a resultant belief that all that need be decided is whether the Virginia decree "comports constitutionally" with this Court's 1964 Opinion (A. 209; 383 Mich. 201, 174 N.W. 2d, 811, 813).

to dispose of the case, the Michigan Supreme Court was required to articulate reasons for the affirmance. That articulation, however, denied the union the benefit of the applicable standard: the State must advance a substantial regulatory interest, in the form of substantive evils flowing from the Petitioner's activities, which would justify the broad prohibitions imposed. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 8, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964).

Even if there had been some proof of substantive evils, the injunctive provisions must fall. It is well-established that the provisions of a decree must relate specifically and exclusively to the proof. If not so related, those provisions are rendered void for vagueness and overbreadth. This is a requirement as stated in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438, 9 L. Ed. 2d 405, 421, 83 S. Ct., 328, 340 (1963) because:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

With these considerations in mind, it is clear that the decretal judgment obviously offends the union's constitutional rights of freedom of speech, petition and assembly. That infringement alone requires the reversal without remandment of the judgment. It is respectfully submitted that this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964), compels that result.

The contrary result reached below was caused by a failure to examine the pleadings, a failure to consider the evidence and a failure to evaluate the specific injunc-

tive provisions in the light of this Court's mandate. These failures permit the majority to recognize, without effect, that this Court not only reversed certain sections of the Virginia injunction of 1962, but further to recognize that this Court remanded with instructions that the basic plan must not be affected and that the activities involved must not be forbidden by the other sections of the 1962 Decree. It also permits the majority to recognize that the lawyers involved must be accorded a "like protection." Despite these recognitions of the language of this Court's Opinion, the Majority Opinion, surprisingly, never discusses any of the injunctive provisions but, instead, defers to the 1966 Opinion by the Virginia Supreme Court of Appeals. It was pointed out to the court below the dubious value in that case as precedent. This is especially so because, after remandment and entry of the modified decree by the trial court, the Brotherhood's Petition for Leave to Appeal was denied upon technical grounds.[2]

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2. The Order entered on March 6, 1968 reads as follows:

"The petition of Brotherhood of Railroad Trainmen for an appeal from a decree entered by the Chancery Court of the City of Richmond on the 20th day of June, 1967, in a certain chancery cause then therein depending, wherein the Commonwealth of Virginia, ex rel. Virginia State Bar was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, in that the petitioner in effect seeks an appeal from the final order entered by this court on June 13, 1966 (207 Va. 182, cert. denied, 385 U.S. 1027), doth reject said petition and refuse said appeal."

Moreover, this was not the first technical distinction made by the Virginia courts in order to adhere to the provisions of the injunctive Decree which were affirmed. That court continued in effect all of the findings of fact made by the Chancery Court of the City of Richmond in 1962. See footnote No. 1, *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 266 (1966). Among the findings are several directly contradicting this Court's statements or rendered irrelevant by reason of this Court's Decision. One of those findings is that counsel are held out as the only approved counsel, a provision which this Court struck from the enjoining portion of the Decree. The retention of these findings was accomplished quite simply on remand by the Chancellor. He held that he was required to enter an injunction by reason of the mandate. He then proceeded to add provisions to the 1962 Decree restraining "solicitation" while permitting "encouraging" or "recommending." As specifically noted by the Virginia Supreme Court of Appeals. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 269 (1966). This distinction was the only one too gross for that court which struck it down, but the Court of Appeals then permitted the findings of fact and the remainder of the injunctive provisions to stand by drawing another, and alternative, distinction. It decided that no doubt was cast on their correctness by this Court's Opinion and that it had held that they were "plainly right" on the denial of leave to appeal prior to this Court's decision. See 149 S.E. 2d 272. This incorporation of the 1962 findings of fact and of the remaining injunctive provisions in the 1968 Decree, as modified, is particularly astounding when

it is noted that no evidence as to any activities in Virginia by the Brotherhood was presented at the 1962 hearing in Virginia. Consequently, the Chancellor there found it necessary to base the injunction on an inference. In support of that inference, the Chancellor made the following finding (see footnote 1, at 149 S.E. 2d 266):

> "And the court finds that there is reasonable ground for apprehension that this plan and course of conduct will, in furtherance of the defendant Brotherhood's avowed purpose, be adopted and put into effect in the City of Richmond, within the jurisdiction of this court."

The judgment below, of course, incorporates such fine distinctions when it defers to Virginia. Virginia's courts, however, were outdone in the drawing of fine distinctions by the courts of Michigan. These distinctions were drawn in the face of a clear recognition of the fundamental issue by the trial court. In 1962, the court stated (A. 111):

> "The problem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved."

Nonetheless, the trial court relied on *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) and on the pleadings disclosing ". . . in substance that the practices complained of were in existence up to May 31, 1959" (A. 109) and issued the 1962 Decree restraining acts neither alleged nor found by the Illinois court. The trial court ignored the holding of the Illinois Supreme Court which was based on public policy grounds and not on constitutional grounds which were neither raised before, nor discussed by, that court permitting the Brotherhood to generally and specifically recommend union counsel to its members. Despite the trial court's

quotation of that section of the Illinois Opinion and despite its holding that freedom of speech was basically involved, it prohibited the making of unsolicited calls upon a member for the purpose of soliciting contracts for the employment of a lawyer or for the purpose of recommending or urging that a lawyer be employed (A. 117). In doing so, it relied on the 1962 Virginia Decree reversed by this Court though ostensibly preferring the Illinois Decree. On its own, it required that sub-paragraph (e) be added which generally enjoined any conduct prohibited by the Illinois decision. It justified that addition on the interesting distinction that the Brotherhood's answer had injected it into the case conveniently ignoring the fact that the Complaint was a paraphrase of the Illinois Opinion and that the State Bar's Exhibits 1 and 2 were a Motion and a Petition, respectively, filed in the Illinois proceeding.

After a full argument and on additional Briefs as to the effect of this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964), the Michigan Supreme Court reversed the 1962 Decree remanding with ". . . permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with . . ." this Court's Opinion. (A. 172); 374 Mich. 152, 132 N.W. 2d 78). On remand, no amendment was proferred; the State Bar stating, "The plaintiff does not care to amend the Complaint . . ." (A. 180). The defendant protested the lack of an amended complaint when the 1965 Virginia Decree was submitted (A. 181) and when the 1968 motion for judgment was made (A. 193). Nevertheless, the trial court entered its 1968 Decree which contained no findings of fact. Its Opinion

ignored the pleadings question, accepted the Virginia Supreme Court's interpretation of this Court's mandate, and distinguished *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967) (A. 174). The Michigan Supreme Court Opinion affirmed the 1968 Decree and drew a final, untenable distinction against the union's interest. The "permission" to amend was only an alternative; the State Bar retained the right to wait and to choose the final Virginia Order.

The net of these decisions in Virginia . . in Michigan is the instant judgment which credits this Court's Opinion with only two effects: (1) it eliminates the specific injunctive provisions specifically struck down and (2) it prohibits the addition of provisions drawing a distinction between "solicitation" on the one hand and "recommending" or "urging" on the other. All the Findings of Fact and all the remaining 1962 injunctive provisions were retained by Virginia. Thus the final Virginia Decree, and hence the judgment below, is the narrowest rational reading possible of this Court's Opinion.

It is respectfully suggested that this Court's mandate required a great deal more. The sum of the Opinion as well as the specific language required a reevaluation of the remaining portions of the Decree and prohibited the rubber stamping given it. As this Court said, the State is required to advance a ". . . substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities . . . [to] . . . justify the broad prohibitions . . . imposed." That statement was itself a quotation from *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 415 (1963). There, as here, the record was devoid of any evidence of interference in the actual conduct of litigation or of any neglect or harassment of clients. Here,

as there, the judgment should be reversed. See 371 U.S. 433.

The invalidity of the instant injunction is rendered more apparent when its provisions are examined in detail. Each of those provisions can be used to chill the union members from exercising their constitutional rights. The first injunctive provision prohibits ". . . giving or furnishing legal advice to . . . members or their families . . . (A. 176). This provision flies squarely in the face of this Court's holding in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5, 6:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

Respondent states that this provision only prohibits "furnishing legal advice" which means "practicing law" (Op. p. 6) and later that this Court ". . . did not authorize the union or any of its members to themselves practice

law by giving or furnishing legal advice" (Opp. 12). This reading ignores the lack of evidence of any "practice of law" as well as the meaning which the ordinary union member would derive from the provision. Attributing such a meaning here assumes a contradictory position to that taken below. There, the contention was that great numbers of cases went to the union lawyers; now it is claimed that a number of these cases were resolved on the basis of a layman's legal opinion.

This is stated despite the fact that the claims involved, unlike workmen's compensation claims, are not self-executing. There is no schedule of amounts which can be the basis of a settlement. Furthermore, when a dispute as to the settlement amount cannot be resolved, it is necessary that an action be filed in some court, an action requiring the services of a lawyer. If all this is put aside and if it is conjectured that members do make statements about the merits of a case, such statements are clearly statements of opinion and are not the giving of legal advice or the practice of law. If it is to be speculated that such statements are, in fact, the practice of law; it is apparent that such statements are almost pure speech and are constitutionally protected. It is, however, suggested that there is no basis for the State Bar's reading of the Decree for it cannot be contradicted that the union's legal aid plan intends that the members cases be channeled to the union lawyer.

The second injunctive provision prohibits "informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer." This provision was placed in the

Virginia Decree with a legal gloss applied by the Virginia Supreme Court of Appeals so that it is to be understood as applying only to assisting lawyers "running and capping for themselves." *Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 271, 272. It is suggested that the gloss was unwarranted and that it subverts the mandate of this Court, endangers the members with a contempt charge on a basis which has nothing whatsoever to do with the operation of the union's program and constitutes a thinly veiled attempt, by that court, to terrorize the Virginia lawyers so that no one of them will participate in the Brotherhood's Plan. As applied in Michigan, it possesses an additional vice, the distinction made in Virginia is not apparent and, indeed, is not ascertainable by the union members in Michigan. Respondent adds a new reading to this provision. Rejecting the Virginia Court's interpretation, it states that the provision prohibits "mass solicitation of claims" subsequent to the rejection of legal counsel in the first instance (Opp. 12). This reading conjures up a situation neither charged in the Complaint nor existing in reality. It is similar to the Virginia reading; but only in that respect.

The majority of the Michigan Supreme Court specifically state that they wish the same conditions to apply in Michigan as were applied in Virginia. Therefore, the Virginia interpretation cannot be disregarded despite the State Bar's assertion. Moreover a ruling by this Court on this point is particularly required. Canon 2, of the new Code of Professional Responsibility adopted by the American Bar Association provides:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

The Illinois Supreme Court has also adopted this Code. This is relevant here because the attorneys named in the Complaint, but not served, practice in Illinois. Ethical Consideration 2, under that Canon, states that the legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.

After a floor fight in the House of Delegates, the American Bar Association adopted amended Disciplinary Rule 2-103 D (5) with the result that lawyers may cooperate with legal service programs "but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities." Since the Rule permits legal service activities only to the extent that they are constitutionally required, it is essential that this Court speak out in language that cannot be misinterpreted or distinguished.

The third provision prohibits "stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." Again, this is a provision as to which there are neither charges nor evidence. Presumably this provision is based upon either Virginia or Michigan law. The State Bar analyzes the provision as barring the offering of "unethical inducements." The trouble with this analysis is that the language does not so provide. Generally, such advances have been held illegal only when they are used as an inducement to a retainer for an attorney. The making of such payments after retainer is permitted in the State of Illinois, *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 121 N.E. 2d 865, 872 (1954). The advancement of expenses, subject to reimbursement, is uniformly permitted; no

State has held such payment illegal. Moreover, it is difficult to comprehend how such a provision can be deemed part of this union's national plan when lawyer's practices, in this regard, vary from State to State.

The fourth provision prohibits "controlling, directly or indirectly, the fees charged or to be charged by any lawyer." This provision relates to the practice of limiting the union lawyers fee to a maximum of 25% which was in existence before the Illinois decision. That limitation has been removed and legal counsel, in fact, charge various percentages in their contingent fee contracts. The injunction, of course, speaks as of 1968 and should be based on evidence in this proceeding and not upon a condition as a result of the 1958 Illinois Opinion.

The remaining 3 provisions in the Decree relate to a supposed profit obtained by the union through the operations of its legal services plan. Interestingly enough, the fifth provision prohibits the receiving of compensation directly or indirectly for the "solicitation" of legal employment. As it reads, that provision is superflous; it does not relate to the legal services plan of the Brotherhood since this Court has already held that those practices do not constitute "solicitation." The State Bar (Opp. 13) states that the effect of this provision is two-fold. It prohibits unethical conduct by the attorney even though no attorney is a part of the proceeding. Secondly, it prohibits compensation for a recommendation by union members. It is not explained why the union members should be compensated for recommending the union lawyers when it is their duty, under the Constitution of the union, to make such recommendation. The State Bar analyzes the fifth and sixth provisions in the Decree as having the same two-fold effect. (It should also be noted

that the union never obtained a profit from practices antedating the Illinois' Opinion. Payments made to the union were solely for reimbursement of expenses.)

The injunctive provisions for reasons delineated above, are unwarranted. They are not based upon the Complaint, with the exception of the fee charged and the payment of litigation expenses. Not one is based upon the evidence in this case. Those provisions, while contained in the modified Virginia Decree were not there based upon charges or evidence. In these circumstances, it is clear that the holding of this Court prohibits such a Decree for the reason that the State Bar, in each instance, has failed to prove any "substantive evils" as required. The dissenting 3 judges below correctly state that the decretal judgment was inconsistent with this Court's Opinion in 1964 Brotherhood.

Since the 1966 Virginia decision, this Court has handed down its decision in *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967). The majority below, however, refused to give serious consideration to that Opinion stating that it involved a different provision and that the remandment by the Supreme Court of Michigan in 1965 required consistency with this Court's 1964 Brotherhood case only (A. 214). In so holding, the Michigan Supreme Court committed basic, fundamental error. It is absurd for that Court to state that it was freezing the union's constitutional rights as of 1964. When the Mine Worker's decision is considered, it is clear that it basically prohibits the provisions in the Decree barring the financial connection. The majority below rely upon the specific language used by the Illinois Supreme Court in its attempted distinction between the Mine Workers and the Brotherhood case.

That distinction was rejected by this Court and the specific language of the Decree was also reversed. The "operative portion" of the Illinois Decree was not as stated by the Michigan Supreme Court but, in fact, permanently enjoined the union from "employing attorneys on salary or retainer basis to represent its members with regard to workmen's compensation claims . . ." The attempted distinction, therefore, has no basis in fact and contradicted this Court's statement at 389 U.S. 224:

"Nor can the case at bar be distinguished from the Trainmen Case in any persuasive way."

When the Decree affirmed is examined, (See footnote 1, 389 U.S. 218, 219) it is seen that those provisions are strikingly similar to the present Michigan provisions. The first provision in Mine Workers is "giving legal counsel and advice" and is practically the same as the first provision here which is "giving or furnishing legal advice." The second and fifth provisions are also related to the first provision here. The second provision prohibits rendering legal opinions and the fifth prohibits practicing law.

The placing of the Mine Worker's attorney on a salary, of course, is a financial connection and a controlling of the fee in a most direct manner. It is directly relevant to the fourth provision of the instant Decree prohibiting the controlling of fees. Respondent now contends that the Mine Worker's case is not the controlling of fees but, "instead'" is the elimination of fees (Opp. 13). The third, or immediately prior provision prohibits statements about the defrayment of expenses or the making of advances. As to this third provision, the State Bar complains that such practices would be "unfair competition." The total elimination of a fee, of course, renders fee competition impossible. It is the ultimate in control of the fee. Stated another

way; no lawyer can compete for non-fee business when his competition is being subsidized by a salary from the union. Applied to this case, it cannot be constitutionally permissible to prohibit one union from controlling the fee charged its members on an individual case basis when another union is permitted to hire an attorney on a salary basis which it sets for all cases within a given area over a year's time.

For the reasons adverted to above, we suggest that this Decree cannot be sustained under *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). When that case is examined in the light of *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 199 L. Ed. 2d 426 (1967), any doubts as to the impropriety of the instant judgment are removed. This is especially so considering the lack of evidence at the only hearing in the case; that in 1960. The dissent below correctly summarizes the basic reasons why the judgment below should be reversed without remandment when it states (A. 219, 220; 383 Mich. 201, 174 N.W. 2d 811, 817):

> "Even if the decree could be sustained under the decision in *Railroad Trainmen*, it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers*.
>
> I would vacate the judgment for the further reason that this is a chancery case in which the State Bar of Michigan seeks injunctive relief. The State Bar failed to amend or update its complaint upon remand by this Court and it failed to produce any proofs, other than the testimony of Mr. Walsh relating to the period from July 1, 1953 through the year 1960. Neither the trial court nor this Court should afford injunctive relief upon proofs as stale as these, the

very most recent of which relate to a period 10 years ago. Furthermore, the evidence is wholly inadequate to sustain the injunctive relief which was granted."

II.

THE OPINION AND JUDGMENT BELOW BEING BASED UPON ACTS NOT PLEADED OR PROVED, AND WITHOUT A HEARING, DEPRIVES THE PETITIONER OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

This case began in 1959 with the Bill of Complaint which paraphrased some factual statements made by the Illinois Supreme Court. *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 263 (1958). The portion selected by the State Bar set out the union's plan of contacting its injured members. This method was admitted by the union as follows (A. 13):

> "Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver that some of the said members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five per cent (25%) of the amount of any recovery whether the recovery be effected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim."

The only additional factual allegation by plaintiff was made on information and belief that representatives of the Brotherhood were reimbursed for their time lost and out of pocket expenses in bringing injured members to the offices of the Brotherhood's attorneys. (A. 8, 57, 58; Plaintiff's Exhibit 1, A. 55, 126-127). In answer thereto, the Brotherhood stated that such reimbursement had continued up to March 31, 1959, but then had been wholly discontinued by order of the president of the union effective April 1, 1959, which time was within the period permitted for compliance by the said Illinois Opinion (A. 14, par. 5).

It was then alleged that this conduct violated Section 28.642 of the Michigan Statutes Annotated prohibiting the solicitation of legal business. That statute was construed by the Michigan Supreme Court in *Hightower* v. *Detroit Edison Company*, 282 Mich. 1, 247 N.W. 97, 99 (1933) as follows:

> "The purpose of the act is to discourage the practice commonly known as 'ambulance chasing.' The practice has developed recognized evils, the major of which are (1) fomenting litigation with resultant burdens on the courts and public purpose; (2) subornation of perjury; (3) muleting of innocent persons by judgments, upon manufactured causes of action and perjured testimony, and by settlements to buy peace; and (4) defrauding of injured persons having proper causes of action, but ignorant of legal rights and court procedure, by means of contracts which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlements made for quick return of fees and against the just rights of the injured persons."[3]

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3. It should be noted that the Act prohibits the charging of exorbitant fees while the union here is accused of undercutting fees.

In its statement of claim required by Michigan law prior to trial, the State Bar's only contention was that the plan of the Brotherhood was an "organized solicitation of claims." In its long opening statement and throughout the trial, only that contention was made (A. 36-60).

The 1962 Decree made findings of fact as to the method of contacting injured members, ignored the other factual allegations and found that the method of contacting members violated the Michigan statute. (A. 113 through 116). After those findings, the 1962 Decree enjoined the union in six separate respects (A. 117-118). The State Bar claims that those provisions encompass all of the specific acts restrained in the 1968 decretal judgment. (Opp. 15). It is clear that those provisions are not even supported by the 1962 Decree findings of fact unless one accepts the Chancellor's belief that he was entitled to enjoin the Brotherhood on the basis of statements made in other cases.

When the 1968 decretal judgment is read side by side with the 1962 Decree, it is seen that the 1962 decree, while unwarranted, is clearly the more specific of the two. Respondent's argument to the contrary should be rejected and its contention that the Petitioner had its hearing in June of 1961 on the provisions of the 1968 decretal judgment likewise should fall. It is also clear that the argument made, even if warranted, would prove entirely too much. Respondent's contentions suggest too much. On the same premise, it also could be contended that the 1962 Decree should have been re-entered and that the Michigan Supreme Court reversal in 1965 was therefore erroneous.

The lack of merit in the respondent's contention is also disclosed when the 1968 Decree is closely examined. This may be the first decree entered under English Law where

there are no findings of fact. It is understandable why the findings of fact of the Virginia Decree were not copied since those findings contain items specifically stricken down by this Court. (See findings contained in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 207 Va. 182, 149 S.E. 2d 265 (1966) at 266). There was, of course, no evidence whatsoever relating to any of the Virginia findings of fact in the Michigan trial.

It would not aid the decree to consider the Michigan statute as embodied in it. That statute, it is quite clear, no longer retains any validity or any applicablity to the Petitioner's plan both because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and because of this Court's prior decision in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). In *Button,* a similar statute was stricken down because of its overbreadth as to the furnishing of legal services by the association there involved, this Court stating at 371 U.S. 433:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant of Property, etc., 367 U.S. 717, 733, 6 L. Ed. 2d 1127, 1137, 81 S. Ct. 1708. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California,

supra (361 U.S. at 151-154); Speiser v. Randall, 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 1472, 78 S. Ct. 1332. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 84 L. Ed. 1213, 1221, 60 S. Ct. 900, 128 ALR 1352.

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the Supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33."

Subsequent to the 1962 hearing, there has been a refusal to amend the Bill of Complaint. Such permission was specifically granted in the remanding order of the Michigan Supreme Court. No further evidence has been introduced and the latest proofs deal with events in 1960. Those proofs are cards containing information furnished by railroads to the Claims Research Bureau of the Association of American Railroads. No other evidence was produced despite the fact that the only witness from that bureau testified that it had investigators in the State of Michigan investigating Michigan claimants since 1953 (A. 102).

The irrelevancy of the evidence in this case is particularly pointed out by the Chancellor's rejection of the union's contention that it had complied with the Illinois decision. The Chancellor stated that that defense position was untenable because of "indefiniteness and uncertainty." (A. 110). The intervening years, of course, would have removed any indefiniteness and uncertainty. Those intervening years would also remove any *de facto* basis since the Illinois decision was superseded by this Court's constitutional decisions.

The foregoing establishes that the injunction decree was without foundation. Assuming, without conceding, that the proof established the commission of some unlawful acts, it is clear that other unlawful acts disassociated from those proven should be stricken from an injunction decree. *State of Wyoming* v. *State of Colorado*, 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company*, 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB*, 362 U.S. 479 (1960). (This, of course, avoids the question as to whether the proof of such "unlawful acts" involved practices substantial enough to warrant the issuance of any injunction.)

As we read the Brief in Opposition by Respondent (pps. 14 to 18) it takes the position that these cases are inapplicable because they do not involve the issue of constitutional due process. In our Petition, they were not cited for that proposition, but were cited because the issue of constitutional procedural due process arises in every instance where the record discloses that no such charges, nor proof, were made prior to or during the 1961 hearing. The issue, in fact, arises every time a court decides that it is entitled to an injunction against the Brotherhood's legal aid plan, not because of any evidence

in the case before it but because of an action taken, or a statement made, by some other court in another proceeding.

The argument against such procedure is most cogently made in *National Labor Rel. Bd.* v. *Express Pub. Co.*, 312 U.S. 426, 433 (1941) where this Court states:

> "But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by § 8(5) is also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.
>
> We cannot find such authority or requirement in the carefully chosen language of § 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice," or in § 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor

persuasively to be related to the proven unlawful conduct."

This is especially true when the Virginia and Michigan courts proceeded upon a theory which can be fairly stated amounted to a belief that it could enjoin any practice criticized by any court since the institution of the Brotherhood's Legal Aid Plan in 1930. It should be remembered also that any favorable finding in any Opinion by any court was uniformly disregarded by the Virginia and Michigan courts. In addition, Petitioner was faced at various points in the proceeding with conditions and burdens of proof which were unknown to it until they were enunciated. For example, only in the Opinion of the Michigan Supreme Court was the union informed that the State Bar had an election as to how it chose to proceed, either by amendment or by awaiting the decision of the Virginia Supreme Court of Appeals to see if it was favorable. This is stated despite the wording of the prior order of the Michigan Supreme Court granting "permission for amendment of plaintiff's Bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said Opinion." If any alternative was intended at that time it would, of course, have been easy to so state in the Order. The other statements by the Michigan Supreme Court that it "wished a specific order forwarded from Washington" and that the case was sent back to the "Jackson Circuit for consistency with the 1964 Brotherhood case—that only" are other examples of this shifting burden of proof.

On the basis of the entire record Petitioner contends that the conduct of the Michigan Courts is so offensive to the ordinary standards of justice as to amount to a denial of procedural due process. This Court has held that when a proceeding has been instituted on particular charges, procedural due process is denied when a judg-

ment is based upon charges not originally made. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

It is, of course, contrary to elementary standards of justice to change the theory on which the case is tried after the trial.[4] If charges as to the injunctive provisions of the 1968 Decree had been made, procedural due process would have required a hearing so that Petitioner could have the opportunity to rebut the charges. This is especially demanded here since the Petitioner at the 1962 trial rested without presenting any evidence. That trial tactic was, of course, taken for that time only upon its belief that the proofs did not justify any injunction.

This requirement of a hearing is so essential to the requirements of procedural due process that this Court has held that it is required when a denial for admission to the Bar occurs on the fifth application for such admission. In *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963), this Court states with particular pertinence here at 373 U.S. 135:

> "There seems no question but that petitioner was apprised of the matters the Committee was considering.
>
> "But a 'full hearing'—a fair and open hearing—requires more than that. . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Govern-

---

4. A similar incident occurred in 1962 when the State Bar appended the decisions of other courts to its Reply Brief. A motion to strike that portion of the Plaintiff's Reply Brief was made by the Petitioner. The court denied that motion stating that it was free to consider "any authorities it deems applicable" (A. 109).

ment proposes and to be heard upon its proposals before it issues its final command." Morgan v. United States, 304 U.S. 1, 18, 19, 82 L. Ed. 1129, 1132, 1133, 58 S. Ct. 773, 999.

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." Id. 304 U.S. at 20. Cf. Gonzales v. United States, 348 U.S. 407, 414, 99 L. Ed. 467, 472, 75 S. Ct. 409."

When these cases are considered in the light of the record in this case, it is surprising that Respondent can contend that Petitioner was afforded procedural due process. The proceedings since remand in 1965 have been contrary to the essentials of that right. For this reason alone, the judgment should be summarily reversed without remandment.

CONCLUSION

For the reasons adverted to above and because of the demands of law and of substantial justice the Judgment and Opinion of the Supreme Court of Michigan should be reversed without remandment.

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Supreme Court of the United States

OCTOBER TERM 1970

NO. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

THE STATE BAR OF MICHIGAN

On Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus,* in support of the Petitioner's position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for by Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred twenty-one national and international trade unions having a total membership of approximately thirteen million five hundred thousand working men and women. This is the third case, involving a group legal service plan founded and directed by a union, that this Court has heard in the past six years, see also, *Trainmen* v. *Virginia Bar,* 377 U.S. 1 (1964); *Mine Workers* v. *Illinois Bar,* 389 U.S. 217 (1967). This figure demonstrates both the labor movement's deepseated interest in fostering constructive developments in this area, and the organized bar's determined resistance to such advances. And it is because of the Federation's profound belief that group legal services provide the best hope of

meeting the legal needs of the average worker that this brief *amicus* is filed to acquaint the Court with its views as to why the decision of the court below should be reversed.

ARGUMENT

THERE HAS BEEN NO SHOWING OF A COMPELLING SUBORDINATING STATE INTEREST WHICH WOULD JUSTIFY THE INJUNCTION REGULATING FIRST AMENDMENT ACTIVITY WHICH HAS BEEN ENTERED HERE.

The importance of the instant case is patent. This Court so recognized by granting the Petition for a Writ of Certiorari. Yet, it is also manifest that its disposition does not require resolution of any novel issue of substance. For, reversal of the decision below is required by *NAACP* v. *Button*, 371 U.S. 415 (1963), *Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964), and *Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967). The explanation of this seeming paradox lies in the hostility of significant segments of the bar and bench to group legal services' plans such as that in issue here, i.e.:

> "Plans by which legal services are rendered:
>
> (1) To individual members of a group identifiable in terms of some substantial common interest,
>
> (2) By a lawyer provided, secured, recommended or otherwise selected by:
>
> (a) The group, its organization, or its officers; or
>
> (b) Some other agency having an interest in obtaining legal services for members of the group." Report of the ABA's Special Committee on Availability of Legal Services, 8 (Aug. 1969).

The Special Committee, chartered by the American Bar Association to study group legal service plans found that the available evidence:

> "amply show[s] that there has been and continues to be an unmet need for legal services . . . [Moreover] all of the studies which have been conducted identify unfamiliarity with legal rights, lack of personal contact

with a lawyer and the cost (or fear of the cost) of his services as the basic reasons why people fail to seek lawyers' services. To a greater degree than any other device, group arrangements provide a solution to all these problems." Special Committee Report, *supra*, at 19.[1]

Nevertheless, the organized bar has continued on its traditional path of maximum feasible resistance. In August 1969 the House of Delegates, the ruling body of the ABA, adopted Disciplinary Rule 2-103(D) which provides that:

> "A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates."

This sweeping prohibition is subject to the exception relevant here that such assistance may be accorded:

> "Any . . . non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, *but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities.*" (emphasis supplied).

As the Special Committee Report, *supra*, properly stated, (at p. 3), the ABA's rule "places the profession in the deplorable position of conceding with obvious reluctance that we will honor the constitutional rights of our prospective clients—but no more."[2]

---

[1] The studies underlying this conclusion are reviewed in the briefs *amicus* filed by the AFL-CIO and by the NAACP Legal Defense Fund in *Mine Workers*, No. 33, October Term, 1966. Since neither the Special Committee, nor our own research, has uncovered significant later source material we respectfully refer the Court to those briefs.

[2] Mr. Justice Harlan, is his dissent in *Mine Workers*, 389 U.S. at 223 n. 17 noted that the question of whether the "prevailing Canons of Ethics and traditional customs in the legal profession will have to be modified to keep pace with the needs of new social developments" was under consideration by the ABA. Disciplinary Rule 2-103(D) is the result of that consideration. It assures that there will be no forward-looking leadership from the organized bar.

The Michigan Supreme Court approached the instant case in the same grudging spirit that has characterized the bar's efforts. This is demonstrated by two facets of its opinion. First, the court below was all but unconcerned with the question of whether this Court's opinions permitted the state bar to secure any relief at all. Instead its concern was to insure that the Union not receive:

> "more First and Fourteenth Amendment protection than the State of Virginia now provides for it. Holding, then, that the Jackson circuit's decretal judgment of 1968 is in accord with the present Virginia decree, we align ourselves with that decree. In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan that it has obtained thus far in Virginia." (A. 213).

Second, the court below flatly refused to apply the teachings of this Court in *Mine Workers*, which was decided after the instant case was remanded to the trial court, but prior to the trial court's decision on remand:

> "We decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 Brotherhood Case—that only." (A. 214).

The result was that the Michigan Supreme Court fell into plain error—as we shall now demonstrate.

1. The basic teaching of *Button*, *Trainmen* and *Mine Workers* is that group activity designed to obtain judicial redress is within the scope of the First Amendment. Such activity, if it is to be meaningful, must fulfill two functions. The first is a "public awareness" and "contacting" function, i.e., the plan must apprise members of their legal rights and advise them of a reliable lawyer familiar with the particular legal problem in question. The second is an "economic function", i.e., the plan must provide a system which spreads costs, and/or increases efficiency and volume thereby making it possible to reduce unit expenses. See, M. Schwartz, *Foreword: Group Legal Services in Perspective*,

12 U.C.L.A.L. Rev., 279, 285-286 (1965). For, as the former Solicitor General, Prof. Archibald Cox, has stated:

> ". . . [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics.
>
> "The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require. It is not that fees are too high. Rendering skilled advice requires time and training that deserve adequate compensation. . . . With the low and middle income groups the financial problem is [that] . . . the need arises suddenly, the cost is disproportionate to income and no savings have been accumulated against the contingency. This economic segment of society taken as a class, however, can afford to, and should therefore, pay for legal services if some way can be found of spreading and sharing the costs.
>
> "Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or with the limited ability to pay . . ." A. Cox, *Poverty and the Legal Profession*, 54 Ill. B.J. 12, 14-15 (1965).

In recognition of the fact that meaningful access to the courts is a fundamental right, this Court has ruled that both basic aspects of group legal service plans are constitutionally protected. *Trainmen* holds (377 U.S. at 5-6):

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal

organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

And *Mine Workers* overturned a decree prohibiting "any financial connection of any kind" between the association and the lawyer it recommended (389 U.S. at 225):

> "The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members. Since the operative portion of the decree prohibits any financial connection between the attorney and the Union, the decree cannot stand; and to the extent any other part of the decree forbids this arrangement it too must fall."

The foregoing holdings are the natural outgrowth of basic First Amendment doctrine. This Court has recognized that:

> "The First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Mine Workers*, 389 U.S. at 222.

Such "indirect restraints" are therefore void unless the state can show that the activity in question "materially and substantially interferes" with a "subordinating interest which is compelling," *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507 (1969); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); see also, e.g., *Wood* v. *Georgia*, 370 U.S. 375, 389 (1962); *Button*, 371 U.S. at 444.

Thus restrictions on group legal service plans must be justified by proof tending to show that the practice which is enjoined is an "oppressive, malicious or avaricious use of the legal process for purely private gain," *Button*, 371 U.S. at 443, or a "commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of Justice," *Trainmen*, 377 U.S. at 6. Moreover, this proof must be based on instances "of abuse, of harm to clients, of . . . actual disadvantage to the public and the profession," *Mine Workers*, 389 U.S. at 225 and not on "dangers . . . far too speculative to justify the . . . remedy invoked," *id.* at 223. For:

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 183-184 (1968).

2. The principles just stated delineate the burden the State Bar was required to shoulder to be entitled to relief. It attempted to meet this burden by relying on the following undisputed facts established by the pleadings. First:

> "That, in or about the year 1930, the Brotherhood of Railroad Trainmen organized and established a so-called "Legal Aid Department" as a division of said Brotherhood of Railroad Trainmen, representing, as reasons for organizing said Legal Aid Department, the following:
>
> 'Many lawyers frequently abuse the confidence of their clients by effecting low settlements in the case in order to obtain a higher settlement in some other

case against the same railroad; incompetently preparing and processing such cases upon the law or the facts; not fully and fairly explaining to the client the terms of the employment, so that the client, after having assented to settlement, finds the proceeds thereof surcharged with items for expenses of litigation, medical expenses, expenses of one sort and another or the like, which are not legitimate, or if legitimate, were not explained to him before the settlement was concluded, as well as in other ways.

'Adequate compensation cannot in general be exacted if members of the Brotherhood are persuaded by claim agents either to settle their own claims or to place them in the hands of incompetent, inexperienced or otherwise inadequate counsel.' " (A. 6-7).

Second, that as of June 9, 1959, the date the answer herein was filed, the Union's Plan worked as follows:

"In many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained." (A. 13).

Third, that prior to April 1, 1959, the Union's Plan had included the following features:

"Representatives of the Brotherhood of Railroad Trainmen are reimbursed for their time in bringing injured employees or the survivors of the deceased employees to the offices of the Regional Counsel. Reimbursement is at the member representative's hourly rate of pay on the railroad. Member representatives are also reimbursed for any out-of-pocket expenses incurred in bringing injured employees or the survivors of deceased employees to Regional Counsel." (A. 8).

* * *

"Some of the [Unions] members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal

> counsel will not charge in excess of twenty-five percent (25%) of the amount of any recovery whether the recovery be affected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim." (A. 13).

In addition the bar relied on evidence designed to demonstrate that between 1953-1960 the legal counsel designated by the Union had handled a substantial, albeit declining, number of the FELA cases involving Michigan residents (A. 64-89).

As we read the record the above constitutes all of the relevant facts which can be gleaned from the pleadings and the trial transcript. These facts establish that the Union's Plan, in its essence, is constitutionally protected:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow." *Trainmen*, 377 U.S. at 5-6.

Moreover, as this Court recognized in *Trainmen*, in regard to FELA claims it can aptly be said that the Union "and its members are in every practical sense identical. The [Union] . . . is but the medium through which its individual members seek to make more effective expression of their own" interests, *Button*, 371 U.S. at 442. This being so, the limitations placed on the judiciary in *Trainmen*, *Mine Workers* and *Carroll*, see, pp. 6-7 *supra*, are controlling in the instant case. It is plain that those limitations were disregarded by the court below.

First, there is no proof that the Union's Plan, as it operated at the time the instant case came to issue, was subject to the evils that *Button* and *Trainmen* state do provide a proper basis for state regulation. There is not a single indication that the Plan led to misuse "of legal

process for purely private gain" or to "commercialization which threaten[ed] the moral and ethical fabric of the administration of justice." Indeed, the evidence offered by the Bar as to the effects of the Plan was restricted to a showing that a significant proportion of the members chose to use Union designated counsel. Since "abuse . . . harm to clients . . . actual disadvantage to the public" must be proved to authorize relief, *Mine Workers*, 389 U.S. at 225, there can be no doubt that the injunction issued here cannot be justified by the terms or the consequences of the Plan the Michigan courts had before them. On this record the Plan "cannot be considered as a threat to legal ethics" *Trainmen*, 377 U.S. at 7.

Second, it is equally manifest that the injunction cannot be justified by the remaining practices which were "admitted" but which the Union contended had been discontinued as of April 1959. *Mine Workers* establishes that the Union had a right to protect its members by securing a commitment from the counsel it recommends that the maximum fee charged would not exceed 25% of the recovery. One of the basic reasons for the Mine Workers plan was to remedy a situation pursuant to which "members . . . were required to pay forty to fifty per cent of the amount recovered in damage suits, for attorneys' fees," 389 U.S. at 219. The Mine Workers dealt with this problem by hiring an attorney thereby putting an end to the fee system. The bar attacked that solution on the ground that it placed a lay intermediary between the attorney and his client. This Court, of course, rejected that challenge on the ground that the financial arrangement between the Mine Workers and its attorney had not resulted in actual abuses, 389 U.S. at 224-225. In the instant case the Union has sought to meet the same problem by limiting the fees charged by the lawyers cooperating with the Plan rather than doing away with that system of compensation. We cannot conceive of a train of thought which could lead to any conclusion other than that the more limited response utilized here is protected under *Mine Workers*. Looking at the matter in terms of the attorney-client relationship the

Union's role in the instant Plan is less obtrusive than it was in *Mine Workers*. And as this Court recognized in that case the danger of conflicts of interest between the union and its members are negligible under either system, 389 U.S. at 224. Finally, here as in *Mine Workers* proof of actual abuses is absent. Thus, the fact that the Union's plan limited the maximum fees charged cannot justify the injunction which has been issued.

The Union also "admitted" that prior to 1959 it paid the members who gave of their time to aid the Plan. The fact that the railroads, and their insurers, pay the claims adjusters, investigators and attorneys who seek to deny or limit the relief obtained by victims of accidents covered by FELA is accepted as a matter of course.[3] First Amendment consideration aside, serious due process questions are raised by a rule of law which allows one side to litigation to secure paid personnel while limiting the other to uncompensated assistance. Moreover, there has been no showing that this aspect of the Union's plan violated the standard of actual harm set out in *Mine Workers*. Thus, this aspect of the Union's plan, like the others, provides no basis for the Michigan courts' injunction.

We have dealt with the pre-1959 aspects of the Plan on the merits in order to demonstrate that they do not provide grounds for relief. It is our view, moreover, that this evidence is too far removed in time to support the judgment at issue, which was entered in May 1968 and affirmed in March 1970. The constitutional presumption is against the regulation of First Amendment conduct. The only justification for an injunction directed at such activity is "the essential needs of the public order," *Carroll*, 393 U.S. at 183. And the needs of the public order do not include in-

---

[3] The sole witness for the Bar in the instant case was an employee of the Association of American Railroads who readily admitted that one of his functions was "to cooperate with the various bar associations throughout the country in connection with railroad claims." (A. 90).

junctions aimed at activity discontinued some eleven years before. Indeed, there is a substantial question as to whether such evidence provides the rational justification for regulation required by due process, see, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239-247 (1957) (overturning an exclusion from the legal profession based on acts 15 years in the past).

The sum of the matter is this. The court below viewed this case as an abstract exercise in which its sole responsibility to this Court's precedents was to measure the injunction against the holding in *Trainmen*, narrowly conceived (A. 211-212). Because it entertained this view it failed to fulfill its responsibility to determine whether the State Bar had made out a case which provided a basis for the regulation of a group legal service plan whose basic purpose and structure entitled it to First Amendment protection. And as we have shown, this inquiry can lead to only one conclusion—that there is nothing in this record which would justify the issuance of any relief whatsoever to the State Bar. The decision below should therefore be reversed with instructions to dismiss or, in the alternative, to allow the Bar to present proof that there are aspects of of the Plan, as presently operated, which entitle it to some measure of relief.

CONCLUSION

For the above stated reasons the decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

THE STATE BAR OF MICHIGAN
Respondent.

BRIEF FOR RESPONDENT

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THE STATE BAR OF MICHIGAN
Respondent.

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Does a state court injunction violate rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins a railroad trainmen's union from: (1) Furnishing legal advice; (2) Informing lawyers that an accident has occurred and the identity of the injured persons for the purpose of obtaining legal employment; (3) Suggesting that the recommended lawyer will advance expenses pending settlement; (4) Controlling the fees charged by the lawyer; (5) Accepting compensation for solicitation of legal employment; (6) Sharing in

the legal fees of the lawyer; and (7) Sharing in any recovery?

II.

Does a Michigan Judgment enjoining a railroad trainmen's union from the acts specified in question I entered in 1968 upon remand from the Michigan Supreme Court in light of the decision of this court in *Brotherhood* without taking additional testimony violate due process when the prior Injunction Decree, more comprehensive in scope, entered after a full hearing, contains substantially all of the injunctive provisions provided in the later 1968 injunction?

COUNTER-STATEMENT

Respondent desires to correct certain inaccuracies and insufficiencies contained in the following subdivisions of Petitioner's "Statement".

a. The Relevant Pleadings and how the Constitutional Question were Raised

The statement that the Brotherhood contended in its answer to the complaint that the application of the Michigan statute to its plan of referring members to union counsel was "contrary to rights granted the Brotherhood under the Federal Constitution (A. 18)" (Br. p. 5) is technically correct but misleading. The claim was that such application was in violation of the Interstate Commerce Clause of the Constitution (Article 1, Sec. 8) and the Supremacy Clause (Article VI, Clause 2) (A. 18) rather than the constitutional guarantees of the First and Fourteenth Amendments involved in this case.

The injunction sought by plaintiff in its complaint was directed to solicitation of F.E.L.A. cases for the benefit of Edward B. Henslee, and associates, or any other of the Regional Counsel of defendant or any other attorney or attorneys (A. 11). In its Pre-Trial Statement, plaintiff claimed it was entitled to an injunction against "solicitation" of such claims within the State of Michigan "for the benefit of out-of-state lawyers, particularly defendants Henslee and Naughton, named herein." (A. 29) In defendant Brotherhood's Concise Statement of Defense it made the additional claims that neither the plaintiff nor the public of the State of Michigan have any property right in F.E.L.A. claims or cases occurring in Michigan and that even if the public had property rights in such cases the plaintiff was not a proper party to enforce such rights (A. 32). No mention was made in the statement of the First and Fourteenth Amendments to the Constitution but merely the general statement that the defendant's rights are governed by "Federal Statutes, the Federal Constitution, and considerations of public policy" (A. 33).

b. The trial and the exhibits.

As pointed out in respondent's Brief in Opposition to the Petition for Writ of Certiorari the partial quotation appearing at the top of page 7 of such petition and again at the bottom of page 5 of petitioner's present brief is misleading. Earlier in his opening statement (A. 54) counsel for respondent said:

> "As the pleadings stand, * * * we believe that substantially all of the allegations of the bill of complaint, all of the material allegations in the bill of complaint, are admitted except as to paragraph 9 alleging that large numbers of cases and claims of members of the Brotherhood of Railroad Train-

men residing in Michigan * * * have been unlawfully and improperly solicited * * *"

Later at A. 60 respondent's counsel stated:

"If the court please, that concludes our presentation under the heading of issues in dispute, and we will refer to Mr. Lumley if he cares to make an opening statement. If not, we are prepared to proceed with our proof under paragraph 9 which is in dispute."

Then at A. 61, the following statement was made which included the twice quoted sentences:

"Mr. Kelly: I offered Exhibits 1 and 2. They are part of the pleading in the Illinois Supreme Court on behalf of the defendant Brotherhood, as explanatory of the matters which are, we admitted in the pleadings; but as a different—the statements published in those records which are also in the pleadings. We haven't offered any proof as to disputed matters. We do not intend to. However, we are ready to go ahead with proof if counsel does not want to make an opening statement. (A. 61)

* * * * *

"Mr. Kelly: But I stated to the Court that those matters were not in dispute and were admitted in the pleadings, and I was going to state them in the record for the purpose of assisting the Court in making the findings of facts.

"We are ready to go ahead.

"The Court: Let's get on with the proofs.

"Mr. Kelly: With our proofs, if counsel doesn't want—

"Mr. Lumley: May I have a ruling on my motion to strike?

"The Court: Your motion to strike is denied." (A. 62)

Immediately following this colloquy, respondent called David J. Walsh to testify as to the disputed matters in paragraph 9 (A. 62). The foregoing clearly shows that respondent was not only ready to but did proceed to prove the only disputed matters in issue in this case.

c. The 1962 decision and decree.

Although the trial court stated that the "* * * recommendation of counsel by the Brotherhood is the nub of the proceedings * * *" (A. 111), the decree quite properly enjoined petitioner from several additional improper and illegal activities such as engaging in the practice of law, accepting pay from lawyers, etc (A. 117, 118).

e. Proceedings on remand.

The brief partial statement quoted in the first paragraph on page 8 of petitioner's brief does not fully express respondent's position as to amendment of the complaint at that time. The following is the complete excerpt from the February 5, 1965 hearing on this subject: (A. 180)

> "It is my belief--I think Mr. Hall concurs in it—that the plaintiff does not care to amend the complaint; but we are informed tthat the Trial Court in the Virginia case has filed an opinion and entered an amended decree pursuant to the remand from the United States Supreme Court in that case.
>
> I believe that the plaintiff * * * will, with leave of the Court, for which we pray, present this Court a further brief directed to the revision of the decree of this Court on terms not inconsistent with the United States Supreme Court opinion in the Virginia case.
>
> * * * * *

"Mr. Kelly: * * * (A.183)

"I do not say to the Court here this morning that the State Bar will not or might not amend its complaint if that should appear necessary or proper in the course of the proceedings.

"At the present time, it is the mind of the State Bar, through its counsel, that the record in this case as made will support a decree granting relief to the State Bar in somewhat altered terms, perhaps, than those of the existing decree and not inconsistent with the United States Supreme Court opinion in the Virginia case."

Thereupon the court ordered the parties to present briefs outlining their respective positions (A. 184-5).

ARGUMENT

I.

THE MAJORITY OF THE MICHIGAN SUPREME COURT SUSTAINING THE DECRETAL JUDGMENT OF THE TRIAL COURT ENJOINING THE UNION IN THE SEVEN RESPECTS SET FORTH IN COUNTER-STATEMENT NO. 1 DOES NOT VIOLATE THE UNION'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Petitioner commenced its argument in its Petition for a Writ of Certiorari by stating that the Decretal Judgment herein involved was entered "* * * with the purpose of interfering with the railroad workers in the exercise of their constitutional rights" (Pet. p. 11). Now petitioner claims that the Decretal Judgment "necessarily interferes with the operation of the union plan of recommending union

counsel to its members" (Br. p. 15). This contention is apparently made because of the fact that the Decretal Judgment "causes the union members in Michigan to be faced with the possibility of a contempt citation if they misinterpret the meaning or effect of the vague injunctive provisions." (Br. p. 15) Respondent submits that the provisions of the Decretal Judgment are neither vague nor subject to misinterpretation. The contention was made in the Petition for Writ of Certiorari that the Michigan court blindly followed the decision and judgment of the Virginia courts and that although both the Virginia Supreme Court of Appeals and the court below recognized that this Court had held the petitioner's basic plan must not be affected or forbidden and that the lawyers involved must be accorded "a like protection" the court below failed to discuss the injunctive provisions in light of this admonition "but instead defers to the 1966 opinion of the Virginia Supreme Court of Appeals." (Pet. p. 11) Now the petitioner claims that the injunctive provisions, exactly duplicative of the final Virginia decree, and which have been in effect since June, 1966, are vague and subject to misinterpretation. If the Virginia decree has not chilled "the exercise of the constitutional rights" of the petitioner and its members in Virgina, certainly such fear and contention is nonexistent in the State of Michigan.

It is submitted that there is no foundation to petitioner's contention that the provisions of the Michigan Decretal Judgment, as well as the like provisions of the Virginia decree, are "types of provisions that this Court addressed itself to" in *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 7, when this Court said that "A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in law-

suits authorized by Congress to effectuate a basic public interest." (Br. p. 15, 16) After this Court vacated the original 1962 Virginia decree, the Virginia Supreme Court of Appeals remanded the case to the Chancery Court of the City of Richmond "for proceedings not inconsistent with the majority opinion of the Supreme Court." (*Brotherhood of Railroad Trainmen v. Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966)). The Chancery Court, after argument, entered a new injunction on January 15, 1965, which differed in certain respects from the 1962 decree. Upon appeal from this 1965 decree, the Virginia Supreme Court of Appeals rendered its opinion (205 Va. 182) setting forth, in footnote 4, the 1965 decree in toto, with certain provisions thereof put in italics for emphasis. The holding of the Virginia court was to delete the emphasized words as being repugnant to the decision of this Court in *Brotherhood*. The "modified decree" thereupon entered in 1967 became the final decree of the Virginia courts in conformity with what the court of last resort of that state had determined would be consistent with this Court's holding in *Brotherhood*. It is accordingly a specious argument to contend that the provisions of the injunction here at issue are violations of the holding of this Court in *Brotherhood*.

The principal thrust of petitioner's argument under Sec. I of its brief is that the Supreme Court of Appeals of Virginia, as well as the Michigan Court, in effect, gave only lip service to the holding of this Court in *Brotherhood*. By footnotes in both the Petition (p. 12) and in its brief (p. 18) petitioner comments that it endeavored to appeal from the final 1967 injunction but to no avail, the Virginia Supreme Court of Appeals holding that such would, in essence, be an appeal from its own former decision. Petitioner states (p. 18) that the dubious value of the

decision of the Virginia Supreme Court was pointed out to the court below and earlier stated: (Pet. Rep. Br. to Resp. Br. Oppos. p. 4) "petitioner, of course, contends that the Virginia court erred * * *". Certiorari having been granted here, this Court has the opportunity to (1) resolve the petitioner's contentions of unconstitutionality of the Virginia court's decision, (2) afford petitioner the determination of which it contends it has previously been deprived on technical grounds, and (3) clarify and set at rest the concern of at least one member of the Virginia court, Justice Carrico, who stated in his dissenting opinion:

> "* * * I do not agree that the labor union involved in this case should be permitted to solicit legal business for its sixteen regional counsel and I cannot believe that the United States Supreme Court ever intended such a result to ensue.
>
> * * * * *
>
> "The decree of the chancellor respects the union's recently declared right to advise injured workers to obtain legal advice and to recommend specific lawyers. The decree forbids solicitation. I would affirm the actions of the chancellor in those respects.
>
> "I would leave it up to the Supreme Court itself to extend its ruling to permit the union to solicit legal business, if that was its intention in the first place. While my powers of prescience are no better than my abilities of clairvoyance, I believe that there is a good chance that the Court, if given the opportunity, will say that it had no such intention." (207 Va. 192-3)

Contrary to the position taken by petitioner, respondent submits that the Supreme Court of Virginia gave full effect to the decision of this Court in *Brotherhood*. The 1965 Richmond Chancellor's decree had attempted to dis-

tinguish between solicitation and recommendation and had enjoined "solicitation". But to give full expression to the decision of this Court, the Virginia Supreme Court of Appeals struck down any such distinction and held that regardless of terminology, the union should be free to pursue its established plan. The excerpt from the Virginia court's opinion (207 Va. at 189) quoted on pages 9-10 of respondent's Brief in Opposition clearly shows the length to which the Virginia court went in this regard.

On pages 23-27 of petitioner's brief, the injunctive provisions of the Michigan decree are discussed with certain references to a corresponding but contrary analysis of the same in respondent's prior Brief in Opposition appearing on pages 11-14. Respondent's position as to these provisions in light of the additional discussion appearing in petitioner's brief is as follows:

a. Furnishing legal advice.

Petitioner contends (Br. p. 23) that this provision flies squarely in the face of this Court's holding in *Brotherhood* and in support thereof quotes a paragraph from this Court's opinion at 377 U.S. 5, 6. It was respondent's contention in its Brief in Opposition that this provision was tantamount to a prohibition against "furnishing legal advice" which in plain language means the practice of law. Petitioner somehow confuses such a prohibition with one that interferes with the exercise of the constitutionally protected rights of union members to "talk together freely as to the best course to follow" and to "select a spokesman from their number who could be expected to give the wisest counsel." Petitioner states that this constitutionally protected right cannot be performed freely and with impunity when an injunction prohibits the "furnishing of legal advice." Respondent submits, as it has previously done, that

this injunctive provision merely prohibits the practice of law by the union (an association of non-lawyers) which clearly falls "within the traditional purview of state regulation of professional conduct." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 9 L. ed. 2d 405, 421 (1963). "That the states have broad powers to regulate the practice of law is, of course, beyond question. See *Trainmen, supra*, at 6, 12 L. ed. 2d at 93, 11 ALR 3d 1196." *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 19 L. ed. 2d 426, 88 S. Ct. 353 (1967). Such broad power of regulation, which necessarily includes the power to exclude, is subject only to the requirement that constitutional guarantees of due process and equal protection be observed. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, 64 ALR 2d 288, (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 1 L. ed. 2d 810, 77 S. Ct. 722 (1957); *People ex rel Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E. 2d 941, 111 ALR 1, cert. den. 302 U.S. 728, 82 L. ed. 562 (1937). The outer limits of the protected activities under the First and Fourteenth Amendments beyond which the state has full regulatory power are indicated in the paragraph of this Court's opinion following the quotation set forth by petitioner at p. 23 of its brief. Therein this Court said:

> "* * * Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not 'ambulance chasing.' The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business. * * *" (377 U.S. 6, 7).

It is clear from the foregoing that this Court meant to and did hold in *Brotherhood* that a restraint against a un-

ion from the "practice of law" does not involve encroaching upon constitutionally protected activities within the First Amendment guarantees of free speech, petition and assembly.

b. Informing lawyers that an accident had happened and furnishing the names and addresses for the purpose of obtaining legal employment for any lawyer.

The sum and substance of the opinions of this Court in *Brotherhood* and later in *Mine Workers* is that a union's activity is constitutionally protected in advising its members to consult specific attorneys or, as was the case in *Mine Workers,* retaining an attorney to represent its members who need legal representation and defraying the expenses of the same. This activity by the union is the extent of and beyond which the union may not go in carrying out its plan as to the recommendation of particular attorneys and, even though such activities result in the "channeling of cases to certain attorneys" such activities are constitutionally protected. Beyond that, the protection ceases. Nowhere did this Court sanction the dissemination by the union of the names of the injured members to attorneys in order to facilitate the commercialized solicitation of claims from such members. The Supreme Court of Appeals of Virginia in 207 Va. at 191, after quoting the following sentence from this Court's opinion in *Brotherhood,* 377 U.S. at 8 "And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge", then went on to say:

> "* * * We take this statement as indicating that the Brotherhood's activities, which were held constitutionally protected under the facts of this case, do not preclude a lawyer from *accepting* employ-

ment. We do not interpret the statement as denying the State's power to enjoin or discipline attorneys who are parties to solicitation of their employment." (207 Va. 191)

Respondent agrees, as did the Michigan court, that the holding of this Court that lawyers accepting employment unler this constitutionally protected plan have a like protection which the state cannot abridge does not sanction traditionally unethical activity on the part of lawyers in solicitation of professional employment. The prohibited activity approved by the Virginia court and likewise approved by the Michigan court clearly facilitates solicitation of claims upon a mass or commercial basis as pointed out earlier in respondent's Brief in Opposition. Petitioner refers to the American Bar Association's Code of Professional Responsibility and particularly Canon 2 and the Ethical Considerations and Disciplinary Rules adopted thereunder, particularly Disciplinary Rule 2-103 D (5) and notes that the code has been adopted by the Illinois Supreme Court. Although the Michigan Supreme Court has not yet acted on the code the respondent herein in October presented to that court its recommendations that the code be adopted in this state with certain slight modifications none of which apply to Disciplinary Rule 2-103. Inasmuch as this Court has granted certiorari in this case respondent does agree with petitioner on the one point: —that this Court should, in its opinion in this case, "speak out in language that cannot be misinterpreted or distinguished" (Pet. Br. p. 26) so that the entire legal profession may know the extent to which it may cooperate with legal services programs "• • • but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, • • •" (see Disciplinary Rule D-103 D (5)).

c. Stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim.

The limits of the constitutionally protected activity of the union terminates upon recommendation. See the *Brotherhood* opinion (377 U.S. at 94) where, in the penultimate paragraph, this Court summarizes its holding as follows:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers."

There is nothing therein to indicate a sanctioning of any further activity on the part of the union to induce its members to select the recommended lawyers by "stating or suggesting" that the recommended lawyer will "defray expenses of any kind or make advances for any purpose." Petitioner states the issue squarely when it says "Generally, such advances have been held illegal only when they are used as an inducement to a retainer for any attorney." (Br. p. 26) This is exactly the activity that is restrained by this provision of the injunction. To argue as petitioner does on pages 26-27 of its brief that such payments after retainers are permitted, citing an Illinois Appeal's Court decision in support of the proposition, (*Mock v. Higgins,* 3 Ill. App. 2d 281, 121 N.E. 2d 865 (1954)) is completely beside the point. The activity to which this provision of the injunction is directed is the making of the statements or the suggestions to induce the retention of the recommended lawyers which clearly is not protected activity. In this connection, it should be noted that the Virginia Supreme Court of Appeals had great difficulty with the provisions of the

1965 revised decree of the Richmond Chancery Court after remand which had restrained the union from soliciting F.E.L.A. claims or "from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; * * *" but with the proviso that nothing therein contained should be construed to restrict the constitutional rights of the petitioner from recommending specific lawyers. The Virginia Supreme Court then said: "The decree thus draws the line between forbidden solicitation and permitted recommendation." (207 Va. at 187). The majority opinion of that court then went on to hold that the Chancellor's order thus too narrowly interpreted Justice Black's opinion and held that "The decree cannot stand in its present form." (207 Va. at 188) The difficulty of drawing such a line between solicitation and recommendation was evidenced, so said the Virginia court, by the insertion of the provisions into the decree that "purport to advise what is meant by 'solicitation'. The decree does not attempt to define 'solicitation'; it merely refers to source materials outside of the decree." By virtue of this and the lack of certainty in the decree the Virginia Supreme Court of Appeals felt the Chancellor's decree could not stand for indefiniteness. Although note was taken of the comment of the dissenting Justices of this Court (207 Va. 189, 190) wherein it was stated:

> "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise. The Court permits a labor union—contrary to state law—to engage in the unauthorized practice of soliciting personal injury cases from among its membership on behalf of 16 regional attorneys whom its president has placed on the union's approved list.
>
> * * * * *

> "This state of affairs degrades the profession, proselytes the approved attorneys to certain required attitudes and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." (377 U.S. at 9)

the Virginia court nevertheless gives full approbation to the apparent holding of the majority, that even if the protected activity may be labelled "solicitation"—"We interpret the opinion as denying the State's right to restrain these activities." (207 Va. 189) As previously noted, (*supra* p. 10) Justice Carrico of the Virginia court forthrightly states that the majority opinion of his Court construed this Court's decision in *Brotherhood* as holding "that the union may engage in solicitation." (207 Va. 192) He then went on to say "The majority, then, has found something which the writer of that opinion failed to express in plain language and which others have found to be quite an illusive prey. See Comment, The Brotherhood case, 51 Va. Law Review 1963." (207 Va. at 192) Justice Carrico then concluded his dissent with the statement quoted *supra*, p. 9, that this Court "* * * if given the opportunity will say that it had no such intention." Thus, this case presents the "opportunity" that Justice Carrico opined probably would occur.

Respondent submits that Mr. Justice Black of the Michigan Supreme Court, the author of the majority opinion below, was completely correct when he stated, "The court, [Sup. Ct. App. of Va.] seeking conformity with the Supreme Court's 1964 opinion, analyzed it with manifest care and, we add, with the deferential respect subordinates owe to their constitutional superiors." (A. 209) The footnote following this statement comments upon the somewhat critical treatment of the majority opinion in the Virginia Law Re-

view Article, "The Brotherhood case", 51 Va. L. Rev. 1693, which is referred to in Justice Carrico's dissenting opinion. This Comment, whose author is apparently cloaked in anonymity, points up the need for clarification by this Court to dispel the confusion resulting therefrom. It is that author's comment that "In line with its failure to make clear whether the states have the power to regulate 'advising' and 'recommending' the court neglected to define 'solicitation' even though its balancing language implies that a state could prohibit the solicitation of business for lawyers." (51 Va. L. Rev. 1696) The author of the article then goes on to state that which is quoted in Michigan Supreme Court Justice Black's footnote (A. 209) referred to *supra p.* 16 and continues on with the following:

> "The state has a clear interest in regulating a plan whereby a lay organization directs all injured members to specific attorneys. Although an interest of the Bar in discouraging concentration of an organization's 'business' in the hands of a few attorneys is hardly a compelling reason for restricting members' freedom of speech and association, the intimate relationship between the designated attorneys and organization officials can readily lead to abuses detrimental to the legal profession. The record in the instant case clearly indicates how easily ambulance chasing and fee-splitting can become realities under a plan such as the Brotherhood's. Furthermore, even though no financial ties exist between the attorney and the organization, his dependence upon organization officials in retaining his position as designated counsel could result in a conflict of loyalty which would interfere with the attorney-client relationship. And even in the absence of specific abuses, the state has an interest in preserving the profession's tradition of independence. A plan such as the Brotherhood's threatens this tradition by channeling all members

> to the same attorney, thereby transforming the attorney into the representative of a parochial constituency."

The enjoined activities here are directed to and only to that type of activity within the framework of the meaning of the word "solicitation" which diverts money to certain lawyers, stimulates litigation or otherwise achieves "a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice." (377 U.S. 6)

d. Controlling, directly or indirectly, the fees charged or to be charged by any lawyer.

In *Mine Workers* (389 U.S. 217, 19 L. ed. 2d 426 (1967)), the Supreme Court held that the union could properly retain an attorney on a salary basis to represent its members and thus avoid the problem of exorbitant contingent fees. By so doing, it does not follow that this Court sanctioned the control by the union of fees that were directly charged by the attorney to his client. Somehow petitioner claims that the retention of such an attorney on a salary basis is in effect a violation of this injunctive restraint. On the contrary the employment of an attorney or attorneys on a salary basis by the union is not an example of ultimate control of the fees but rather a substitute for or elimination of all direct fees charged by the attorney to the client. Rather than directing its discussion to this provision, petitioner in its brief (p. 27) makes the spurious contention that this provision "relates to the practice of limiting the union lawyers' fee to a maximum of 25% which was in existence before the Illinois decision." The statement is then made that this limitation has now been removed and that legal counsel charged various percentages in their contingent fee contracts. All of this is completely beside the point

and has nothing to do with the constitutional validity of this provision in the injunction of the Michigan court which had the mature consideration and review of the Virginia Supreme Court of Appeals, the trial court in this case and thereafter the Michigan Supreme Court upon affirmance of the trial court's injunctive judgment.

e.-g. Accepting or receiving compensation for solicitation of legal employment for any lawyer; sharing in legal fees; and sharing in any recovery.

An examination of the opinions in *Button, Brotherhood* and *Mine Workers* demonstrate that the acceptance of a retainer by an attorney stemming from protected activities of the union is constitutionally protected. As stated in *Brotherhood,* (377 U.S. at 8) "* * * of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge." This Court in those decisions did not sanction conduct by an attorney which traditionally has been held to be unethical or illegal.[1] Moreover, these decisions did not sanction any payment by the attorney to the union in return for its recommendation to its members that he be sought out and retained. Any such activity was not involved in the consideration of this Court in any of the foregoing three cases and was not considered, to say nothing of being sanctioned in the opinions in those cases.

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[1] For instance, as this Court pointed out in *Button* (371 U.S. at 423) statutory regulation of unethical and nonprofessional conduct by attorneys had been in force in Virginia since 1849, including the outlaw of solicitation of legal business in the form of "running" or "capping". However, in 1956, an attempt was made to proscribe the activities of the N.A.A.C.P. by amending the statute to include within the definition of "runner" or "capper" an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.

Petitioner has grouped together these three provisions of the injunction below and discusses them together, hence we do likewise. Petitioner contends that these injunctive restraints relate to a "supposed profit obtained by the union through the operations of its legal services plan." (Br. p. 27) Regardless as to whether these provisions attempt to restrain a so-called "supposed profit" or an actual profit, such restraints are proper and do not invade constitutionally protected activities as any financial gain for the union as a result of the operation of the plan of recommending and thus the channelling of business to the recommended attorneys was not sanctioned by this Court in either *Button*, *Brotherhood* or *Mine Workers*. Hence such restraint, as determined to be valid by the Virginia Supreme Court of Appeals and later by the Michigan Supreme Court below in this case is a proper exercise of the state's broad powers to regulate the practice of law within its borders. (377 U.S. at 7) The decisions of this Court, first in *Button*, followed by *Brotherhood* and later in *Mine Workers* held that the activities of a union in recommending the hiring of specific legal counsel or the retaining of an attorney on a salary basis to represent the members of the union or organization or group, motivated, as indicated in the records in those cases, by genuine concern on the part of the union, organization or group for the welfare of its members, was a constitutionally protected form of free speech, petition and assembly. However, nothing can be gleaned from the opinions in those cases that this Court considered that such conduct was sanctioned when the motivation was the desire for financial gain. When any such motivation existed, this obviously could not be related to an exercise of the constitutional privilege of free speech guaranteed by the First Amendment.

All restraints contained in these final three provisions of the injunction in this and the prior Virginia decree are

directed toward prohibiting improper financial relations between a lay agency and its favored attorneys and/or fee splitting. All of such have traditionally been a subject of proper regulation by the states and beyond and outside of constitutionally protected activities under the First and Fourteenth Amendments.

II.

THE INJUNCTIVE JUDGMENT ENTERED IN 1968 UPON REMAND FROM THE MICHIGAN SUPREME COURT WITHOUT THE TAKING OF ADDITIONAL TESTIMONY DOES NOT VIOLATE DUE PROCESS.

In footnote 5 appearing on pages 15-16 of respondent's Brief in Opposition to the petitioner's Petition for Writ of Certiorari herein sets forth in an abbreviated and comparative form the provisions of the 1968 Decretal Judgment as compared to the 1962 decree. For ready reference, we are attaching a copy thereof as an appendix to this brief. (See appendix attached at p. 27 hereof). As therein indicated, the 1962 decree restrained the defendants[2] from six specific

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[2] When the 1962 decree was entered there were a number of named individual defendants who were union officers and members and that decree enjoined not only the union but the named individual defendants. After remand from the Michigan Supreme Court, at the May 24, 1968 hearing before the trial court, that court took note of the fact that there was pending before it two motions to dismiss the case as to all individually named defendants with the exception of three. The court, accordingly, granted the motions to dismiss and stated that because the case was a class action and there were only three remaining individual defendants, he "hereby, *sua sponte*, orders this matter dismissed as to the remaining three also." The court then goes on to state: "So there will be no misunderstanding, the remaining defendants herein are The Brotherhood of Railroad Trainmen and all members, agents and officers of The Brotherhood of Railroad Trainmen in the State of Michigan." (A. 175)

types of activities delineated a. through f. (A. 117-118) That decree was based upon admissions in the pleadings (A. 36-51, 54) and evidence introduced at the trial (A. 55-60, 63-106, 120-169) following which an opinion was filed by the trial court making findings based thereon. (A. 109-112) Following this decision the 1962 decree was entered. (A. 113-118) Encompassed within five of these six restrained activities are all of the specific acts restrained in the 1968 Decretal Judgment.

The argument is made on page 33 of petitioner's brief that the restrained activities in the 1962 decree are not predicated on "findings of fact unless one accepts the Chancellor's belief that he was entitled to enjoin the Brotherhood on the basis of statements made in other cases." This is not a valid claim of a deprivation of procedural due process by the Michigan courts in violation of the Fourteenth Amendment to the U.S. Constitution. Rather it is a claim that the trier of the facts arrived at an erroneous conclusion. It is, of course, fundamental that the due process clause of the Fourteenth Amendment does not control forms of procedure or practice in state courts unless fundamental principles of hearing and notice are affected. *16 Am. Jur. 2d*, Cons. Law Sec. 549, p. 943-4. The jurisdiction of this Court under the Fourteenth Amendment was definitely ruled upon and determined on this issue in the case of *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission*, 309 U.S. 30, 84 L. ed. 563 (1940) where the following appears:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal ques-

tion. *Arrowsmith v. Harmoning*, 118 US 194, 196, 30 L. ed. 243, 6 S. Ct. 1023; *Bonner v. Gorman*, 213 US 86, 91, 53 L. ed. 709, 711, 29 S. Ct. 483; *American R. Exp. Co. v. Kentucky*, 273 US 269, 273, 71 L. ed. 639, 641, 47 S. Ct. 353."

In the first of the cases cited in the above quotation *Arrowsmith v. Harmoning*, 118 U.S. 194, 30 L. ed. 243, decided in 1886, Chief Justice Waite stated the obligation of the states under the Fourteenth Amendment with which no serious question has ever since been voiced, in words as follows:

> "• • • Certainly, a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. • • •"

As respondent stated in its Brief in Opposition, the cases cited by petitioner in support of its position that procedural due process had been denied in this case are not applicable. As we pointed out (Br. in Oppos. p. 16-18), *State of Wyoming v. State of Colorado*, 286 U.S. 494, 76 L. ed. 1250 (1932) involves the construction of and breadth of an injunction entered in an earlier suit between the parties, this being an original proceeding in this Court brought by the State of Wyoming against the State of Colorado. Accordingly, no issues involving the question as to a state's alleged deprivation of rights of its citizens to procedural due process under the Fourteenth Amendment was involved. Likewise, in *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 85 L. ed. 930 (1941) and *Communication Workers of America, AFL-CIO v. N.L.R.B.*, 362 U.S. 479, 4 L. ed. 2d 896 (1960) the questions before the court were the power of a federal court to restrain acts in violation of the National Labor Relations Act. The quotations from the

opinions in those cases appearing on p. 17-18 of respondent's former brief clearly show the issues there before the court and that such are entirely foreign to the question of procedural due process under the Fourteenth Amendment. Petitioner now says (Br. p. 36-37) that it did not cite those cases "for that proposition, but were cited because the issue of constitutional procedural due process arises in every instance where the record discloses that no such charges, nor proof, were made prior to or during the 1961 hearing." The holding of this Court in *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, supra,* disposes of petitioner's contention in this regard. Further, the lengthy quotation from *N.L.R.B. v. Express Publishing Co., supra,* set forth on p. 37-38 of petitioner's brief clearly shows that the issue there before the court was the scope of and specificity of the order of the Board which had properly entered an order against an employer to cease and desist from refusing to bargain but this Court held that a finding of a violation in that respect did not justify the making of a blanket order restraining the employer from violating the statute in any manner whatsoever. As the court stated in the quoted excerpt, the reasons for specificity are that "when judicially confirmed, the courts may be called on to enforce by contempt proceedings, [accordingly, the order] must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing." This issue is not the case here.

Petitioner again cites *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. ed. 2d 117 (1968)[1] as support for the contention that "the conduct of the Michigan courts is so offensive to the ordinary standards of justice as to amount to a denial

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[1] Petitioner erroneously cites this case, not only in its petition, but again in its brief as 20 L. ed. 117.

of procedural due process." (Br. p. 38-39). As we pointed out earlier in our Brief in Opposition, the lack of procedural due process found by this Court in *Ruffalo* was that during the hearing before the Ohio Disbarment Proceedings the principal charge upon which the respondent attorney was found guilty and disbarment ordered was added to the specification of charges during the course of and on the third day of the trial. In the instant case, all of the charges with which the defendants were charged in the original complaint and at the subsequent trial were all ultimately found to warrant the issuance of an injunction in this case, the terms of which were duplicative of the final Virginia decree. Nothing in the instant case can be termed as a "trap" to the defendant as this Court likened the Ohio disciplinary proceedings in *In re Ruffalo* when, as the court stated, after the proceedings "* * * are under way, the charges are amended on the basis of testimony of the accused." The essential factual situation in that case is clearly distinguishable from and the decision therein no precedent in the instant case.

The decision in *Willner v. Committee On Character & Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. ed. 2d 224, 2 ALR 3d 1254 (1963) is likewise not in point. In that case no hearing was ever had at which Willner was confronted with the evidence that formed the basis for the decision of the *Committee On Character & Fitness* as to his lack of qualifications to be admitted to the bar of the State of New York, nor could he determine what such evidence was. Willner had passed the bar examinations in 1936 and two years later, the Committee had filed with the New York Appellate Division its determination that it was not satisfied that *Willner* possessed the character and general fitness requisite for an attorney and counsellor at law. During the following 22 years, Willner continually endeavored to qualify for admis-

sion to the bar including the making of five applications to the New York Appellate Division all of which were denied without an opinion. The crux of the decision of this Court is found in the final paragraph of the opinion as follows:

> "We hold that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed against him before either the Committee or the Appellate Division."

No such denial of a hearing of any kind occurred in the instant case.

CONCLUSION

For the reasons above stated, respondent respectfully submits that the judgment below and the opinion and decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

1968 Decretal Judgment	*1962 Decree*
(Full text at A. pp. 176-177)	(Full text at A. pp. 113-118)
1. Giving or furnishing legal advice to its members or their families	a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan;
2. Informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer.	b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;
	d. Making unsolicited calls upon any person for the purpose of soliciting contracts for the employment of a lawyer by such person, or for the purpose of recommending or urging the employment of any particular lawyer or group of lawyers by such person.
	e. Engaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in *In Re Brotherhood of Railroad Trainmen,* 150 Northeastern Reporter 2nd, 163.

3. From stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim.	e. See text of e. above.
4. Controlling, directly or indirectly, the fees charged or to be charged by any lawyer.	b. and e. See above for texts of b. and e.
5. From accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise.	c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services; and e. above.
6. From sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any laymen or lay agency.	c. and e. See above for texts of c. and e.
7. From sharing in any recovery for personal injury or death by gift, assignment or otherwise.	c. and e. See above for texts of c. and e.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 434.—October Term, 1970

United Transportation Union, Petitioner, *v.* The State Bar of Michigan. } On Writ of Certiorari to the Supreme Court of Michigan.

[April 5, 1971]

Mr. Justice Black delivered the opinion of the Court.

The Michigan State Bar brought this action in January 1959 to enjoin the members of the Brotherhood of Railroad Trainmen [1] from engaging in activities undertaken for the stated purpose of assisting their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.[2] The complaint charged, as factors relevant to the cause of action, that the Union recommended selected attorneys to its members and their families, that it secured a commitment from those attorneys that the maximum fee charged would not exceed 25% of the recovery, and that it recommended Chicago lawyers to represent Michigan claimants. The State Bar's complaint appears to be a plea for court protection of unlimited legal fees. The Union's answers admitted that it had engaged in the practice of protecting members against large fees and incompetent counsel; that since 1930 it had recommended, with respect to FELA claims, that injured member employees, and their families, con-

[1] On January 1, 1969, after the decree was entered in the court below, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union. The successor union is the petitioner in this case.

[2] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.

sult attorneys designated by the Union as "Legal Counsel"; that prior to March 1959, it had informed the injured members and their families that the legal counsel would not charge in excess of 25% of any recovery; and that Union representatives were reimbursed for transporting injured employees, or their families, to the legal counsel offices.

The only evidence introduced in this case was the testimony of one employee of the Association of American Railroads in 1961 that from 1953 through 1960 a large number of Michigan FELA claimants were represented by the Union's designated Chicago legal counsel. Based on this evidence and the Union's admissions set out above, the state trial court in 1962 issued an order enjoining the Union's activities on the ground that they violated the state statute making it a misdemeanor to "solicit" damage suits against railroads.[3] The Union appealed to the Michigan Supreme Court, but before the case was argued on appeal, this Court handed down its decision in *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U. S. 1 (1964), involving a similar injunction secured by the Virginia State Bar against the Union. We held in that case that the First Amendment guarantees of free speech, petition, and assembly give railroad workers the right to cooperate in helping and advising one another in asserting their rights under the FELA. While not deciding every question that possibly could be raised, our opinion left no doubt that workers have a right under the First Amendment to act collec-

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[3] Section 28.642, Mich. Stat., in relevant part provides:

"Any person, . . . or organization of any kind, either incorporated or unincorporated, . . . who shall directly or indirectly, . . . solicit any person injured as the result of an accident . . . for the purpose of representing such person in making claim for damages . . . shall be guilty of a misdemeanor . . . ."

tively to secure good, honest lawyers to assert their claims against railroads.

Acknowledging our decision in *Trainmen*, the Michigan Supreme Court remanded the instant case to the state trial court with permission for amendment of the complaint "to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." 374 Mich. 152, 155, 132 N. W. 2d 78, 79. After remand, the State Bar made a motion for further proceedings. That motion was heard on February 5, 1965, at which time the Bar declined to amend its complaint. For reasons not explained in the record, the case lingered in the trial court until May 24, 1968. On that date, after a motion for judgment by the State Bar and arguments on the motion, the trial court adopted verbatim the injunction entered in the Virginia state courts after our remand in *Trainmen*.

In affirming the trial court decree, the material part of which is set out below,[4] the Michigan Supreme Court gave our holding in *Trainmen* the narrowest possible

[4] The decree entered by the Michigan trial court permanently restrained and enjoined the Union:

"from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."

reading,[5] focusing only on the specific literal language of the injunctive provisions challenged in that case rather than the broad range of union activities held to be protected by the First Amendment. Similarly, the Michigan court erroneously restricted our holding in *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967), to "the operative portion" of the Illinois decree prohibiting any financial connection between the attorney and the Union. The Michigan Supreme Court failed to follow our decisions in *Trainmen*, *United Mine Workers*, and *NAACP* v. *Button*, 371 U. S. 415 (1963), upholding the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable. When applied, as it must be, to the Union's activities reflected in the record of this case, the First Amendment forbids the restraints imposed by the injunction here under review for the following among other reasons.

First. The decree approved by the Michigan Supreme Court enjoins the Union from "giving or furnishing legal advice to its members or their families." Given its broadest meaning, this provision would bar the Union's members, officers, agents, or attorneys from giving any kind of advice or counsel to an injured worker or his family concerning his FELA claim. In *Trainmen* we upheld the common sense proposition that such activity is protected by the First Amendment. Moreover, the plain meaning of this particular injunctive provision would emphatically deny the right of the Union to employ counsel to represent its members, a right explicitly upheld in *United Mine Workers*[6] and *NAACP* v. *Button*.

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[5] 383 Mich. 201, 174 N. W. 2d 811.

[6] The decree overturned in *United Mine Workers* also enjoined the Union from: "Giving legal counsel and advice." 389 U. S., at 218, n. 1. It was conceded in that case that the provision was directed at the Union's employment of an attorney.

We cannot accept the restricted interpretation of this provision urged by the State Bar, and accepted by our Brother HARLAN, that it only prohibits the Union or its members themselves from "practicing law." The record is devoid of any evidence or allegation of such conduct on the part of the Union or its members. A decree must relate specifically and exclusively to the pleadings and proof. If not so related, the provision, because of its vagueness, will jeopardize the exercise of protected freedoms. This injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction like we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be striken down. Our statement in *NAACP* v. *Button* concerning the statute there in question is equally applicable to the injunction now before us: "[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." 371 U. S., at 438.

Second. The decree also enjoins the Union from furnishing to any attorney the names of injured members or information relating to their injuries. The investigation of accidents by Union staff for purposes of gathering evidence to assist the injured worker or his family in asserting FELA claims was part of the Union practice upheld in *Trainmen.* 377 U. S., at 4, n. 8. It would seem at least a little strange now to hold that the Union cannot communicate that information to the injured member's attorney.[7]

[7] Our Brother HARLAN suggests that the injured member should be free to direct the collected information to whatever lawyer he chooses, rather than for the Union to give it to the Union's recommended legal counsel. However, the injunction prohibits the Union from furnishing the information to "any lawyer," apparently including both recommended and nonrecommended counsel alike. The injunction would prohibit the injured member's attorney, regard-

Third. A provision of the decree enjoins the members of the Union from "accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise." The Union conceded that prior to 1959, Union representatives were reimbursed for their actual time spent and out-of-pocket expenses incurred in bringing injured members or their families to the offices of the legal counsel. Since the members of a union have a First Amendment right to help and advise each other in securing effective legal representation, there can be no doubt that transportation of injured members to an attorney's office is within the scope of that protected activity. To the extent that the injunction prohibits this practice, it is invalid under *Trainmen, United Mine Workers,* and *NAACP* v. *Button.*

Fourth. Our Brothers HARLAN and WHITE apparently accept the State Bar contention that the provision prohibiting compensation to Union representatives for solicitation refers to compensation paid by the attorney rather than the Union. And so interpreted, it supplements the two provisions which prohibit the Union from sharing in legal fees received by the recommended counsel. There is no basis for this restraint. Such activity is not even suggested in the complaint. There is not a line of evi-

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less of whether or not he was recommended by the Union, from communicating with the Union's representative who investigated the accident, is familiar with the facts, and, other than the injured member himself, is probably the person most qualified to answer the attorney's questions and assist in preparation of the claim. To satisfy the Michigan court's notion that direct communication between the Union and the member's attorney is somehow unlawful, it seems our Brother HARLAN would restrict the Union's efforts, which we expressly approved in *Trainmen,* of assisting the injured member in preparing his case for trial, to a written accident report filed with the injured member.

dence concerning such practice in the record in this case. If there is any such suggestion, it is in records in other cases involving other parties in other courts, records upon which we believe our Brother HARLAN erroneously seeks to rely. In fact, the explanation for the appearance of the provisions in this decree appears to be the Michigan court's verbatim adoption of a Virginia injunction issued in a different case on different pleadings relating to different facts. Decrees between litigants should not rest on any such unsupportable basis as this.

Our Brother HARLAN appears to concede that the State Bar has neither alleged nor proved that the Union has engaged in the past, is presently engaging, or plans to engage, in the sharing of legal fees. Nonetheless, he suggests that the injunction against such conduct is justified in order to remove any "temptation" for the Union to participate in such activities. We cannot accept this novel concept of equity jurisdiction that would open the courts to claims for injunctions against "temptation," and would deem potential "temptation" to be a sufficient basis for the issuance of an injunction. Indeed, it would appear that jurisdiction over "temptation" has heretofore been reserved to the churches.

An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct. In *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 262 (1917), this Court struck the portions of a decree enjoining a union from picketing and physical violence because there was no evidence that either of these forms of interference was threatened.[8] Likewise in the present case, with respect to the prohibi-

[8] Mr. Justice Brandeis dissented on the ground that this principle should have been applied to strike the other provisions of the injunction as well. 245 U. S., at 263 (Brandeis, J., dissenting).

tion against sharing legal fees, the State Bar simply has made no showing that such conduct was threatened. Indeed, it has made no showing at all. Therefore, that provision of the decree, to use an often quoted slogan, would appear to be not only unjustified, but also "arbitrary and capricious."

Fifth. Finally, the challenged decree bars the Union from controlling, directly or indirectly, the fees charged by any lawyer. The complaint alleged that the Union sought to protect its members from excessive legal fees by securing an agreement from the counsel it recommends that the fee will not exceed 25% of the recovery, and that the percentage will include all expenses incidental to investigation and litigation. The Union in its answer admitted that prior to 1959 it secured such agreements for the protection of its members.

United Mine Workers upheld the right of workers to act collectively to obtain affordable and effective legal representation. One of the abuses sought to be remedied by the Mine Workers' plan was the situation pursuant to which members "were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees." 389 U. S., at 219. The Mine Workers dealt with the problem by employing an attorney on a salary basis, thereby providing free legal representation for its members in asserting their claims before the state workmen's compensation board. The Union in the instant case sought to protect its members against the same abuse by limiting the fee charged by recommended attorneys. It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel. Indeed, the Michigan

court was foreclosed from so doing by our decision in *United Mine Workers.*[9]

In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP* v. *Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen,* and *NAACP* v. *Button.* The injunction in the present case cannot stand in the face of these prior decisions.

Reversed.

MR. JUSTICE STEWART took no part in the decision of this case.

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[9] The injunction also bars the Union "from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." The only allegation in the complaint possibly relating to this injunctive provision is that the Union representatives informed the injured members that the 25% fee included all expenses. This provision of the injunction, therefore, is invalid for the same reasons that the provision limiting fees is invalid.

SUPREME COURT OF THE UNITED STATES

No. 434.—October Term, 1970

United Transportation Union, Petitioner, v. The State Bar of Michigan. } On Writ of Certiorari to the Supreme Court of Michigan.

[April 5, 1971]

Mr. Justice Harlan, concurring in part and dissenting in part.

The Court's conclusions with respect to the issues presented by the case at bar are, in my view, flawed by the absence of any examination of the relationship between this case and the substantially contemporaneous proceedings in Illinois and Virginia against the same union with respect to the same charges of unprofessional conduct in the Brotherhood's "Legal Aid Department."

I

The history of the establishment of the Legal Aid Department and the early attacks upon it by state and local bar associations, with the assistance and encouragement of the Association of American Railroads, has been fully recounted elsewhere. See Bodle, Group Legal Services: The Case for *BRT*, 12 U. C. L. A. L. Rev. 306, 307–317 (1965); Note, 50 Cornell L. Q. 344 (1965). The most significant point in this history, for present purposes, came in the late 1950's. With disciplinary proceedings pending against its Regional Counsel in Chicago,[1] the Brotherhood counterattacked by moving in the Supreme Court of Illinois for a declaration that the Brotherhood's plan was both legal and compatible with the minimum

[1] The Chicago Regional Counsel had jurisdiction over the lower peninsula of Michigan, where this lawsuit was brought. App. 14.

standards of professional conduct. After hearings before a special commissioner, the Illinois court found that the basic facts with respect to the operation of the Legal Aid Department were not seriously disputed:

> "As it presently operates, the legal aid department of the Brotherhood maintains a central office in Cleveland, Ohio, at the national headquarters of the Brotherhood. In that office it has a staff consisting of a chief clerk, a research analyst, three stenographers and a file clerk. It also has a number of regional investigators. The Cleveland office serves as a clearing house which receives reports from all Brotherhood Lodges of instances in which members have been injured or killed in railroad accidents. It notifies the appropriate regional investigator and regional counsel of all accidents.
>
> . . . . .
>
> "By agreement with the Brotherhood the attorneys who are designated as regional counsel charge a fee of twenty-five per cent of the amount recovered in each case, whether recovery is by settlement or by judgment. Regional counsel have also agreed to and do pay all court costs, investigation costs, costs of doctors' examinations, expert witness fees, transcript costs and the cost of printing briefs on appeal. They also pay the total cost of operating the legal aid department of the union [including the department's ratable share of the expenses of the Brotherhood's conventions.] All expenses of the legal aid department are apportioned among the sixteen regional counsel in the ratio that their respective gross fees bear to the total gross recoveries throughout the country . . . .
>
> "The Brotherhood constitution requires that each local lodge appoint someone whose duty it is to fill

out an accident report whenever a member is injured, and also to make contact with the injured man, or the relatives of the man who is killed, and make it known that legal advice will be given free of charge by the regional counsel. He also makes known the availability of regional counsel to handle the claim and any ensuing litigation for a total charge of twenty-five per cent of the amount recovered by settlement or by litigation. The twenty-five per cent includes all expenses of investigation and litigation.

"The lodge member who investigates the occurrence and makes contact with the injured man recommends and urges that regional counsel be consulted and employed. These men carry blank copies of contracts employing the regional counsel's firm as attorneys. The regional investigators employed by the legal aid department also carry these contracts. If a signed contract is not obtained by an investigator in the field, an investigator often brings the interested parties to the office of the regional counsel in Chicago. The injured man may be accompanied by his wife, and if the interested party is a widow, the wife of the investigator also makes the trip. The expenses of these trips are paid immediately by regional counsel. The lodge member who investigates and urges the employment of regional counsel is also compensated by regional counsel at his regular hourly wage rate for time spent in investigating the case and in making the trip to Chicago. These amounts are paid whether or not the regional counsel is retained, and regardless of the ultimate outcome. In addition [the regional counsel in Chicago] testified, 'There are many times when one of the boys will bring in a case,

and taking care of the investigation, etc., they are given a gratuity of $100 or $150.'" *In re Brotherhood of R. R. Trainmen*, 13 Ill. 2d 391, 392–395, 150 N. E. 2d 163, 165–166 (1958).

On the basis of the facts thus found, the court laid down the following guidelines to indicate to the Brotherhood what it could and could not do in connection with personal injury and wrongful death claims with respect to its members:

"We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood.

"The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully. Its employees, however, may not carry contracts for the employment of any lawyer, or photostats of settlement checks. No financial connection of any kind between the Brotherhood and any lawyer is permissible. No lawyer can properly pay any amount whatsoever to the Brotherhood or any of its departments, officers or members as compensation, reimbursement of expenses or gratuity in connection with the procurement of a case. Nor can the Brotherhood fix the fees to be charged for

> services to its members. The relationship of the attorney to his client must remain an individual and a personal one.
>
> "The course thus outlined, if adopted, will make it possible for the Brotherhood to achieve its legitimate objectives without tearing down the standards of the legal profession." *Id.*, at 397–398, 150 N. E. 2d, at 167–168.

The court gave the Brotherhood over a year, until July 1, 1959, to bring itself into compliance with these standards. *Id.*, at 399, 150 N. E. 2d, at 168.

The decree thus rendered appeared to satisfy both the Brotherhood and the Bar. See Note, 50 Cornell L. Q. 344, 348 and n. 32 (1965); Bodle, Group Legal Services: The Case for *BRT*, 12 U. C. L. A. L. Rev. 306, 317 (1965). By letter dated March 16, 1959, the president of the Brotherhood directed all Legal Counsel "to live up to said opinion in its entirety" on pain of being removed from office and reported to the local bar association. The letter also announced that "The Brotherhood will finance its Legal Aid Department, and will investigate accidents so that it will be acquainted with the cause of said accidents, and by so doing will be able to remedy any violation of the Federal Employers' Liability Act and The Safety Appliance Act. The result of such investigation shall be made available only to the injured person." App. 16–17. The opinion of the Illinois court and the letter of the BRT president directing compliance therewith became the basis for consent judgments in Nebraska,[2] Missouri,[3] and several other States.[4]

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[2] *State ex rel. Beck* v. *Lush*, 170 Neb. 376, 103 N. W. 2d 136 (1960).

[3] *Hulse* v. *Brotherhood of R. R. Trainmen*, 340 S. W. 2d 404 (Mo. 1960).

[4] Initially it appeared that a consent decree might be entered in the Michigan proceedings, but this possibility never eventuated. App. 30–31.

The Virginia Bar, however, was not content with the anti-solicitation measures ordered by the Illinois court,[5] and it pressed for and obtained a more sweeping decree. That decree, as originally entered, restrained the Brotherhood

> "[1] from giving or furnishing legal advice to its members or their families; [2] from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; [3] from informing any lawyer that an accident has occurred and furnishing the name and address of an injured or deceased member for the purpose of obtaining legal employment for such lawyer; [4] or in any other manner soliciting or encouraging such legal employment of the selected lawyers; [5] from stating or suggesting that such selected lawyers will defray expenses and make advances to clients pending settlement of claims; [6] from controlling, directly or indirectly, fees charged or to be charged by any lawyer; [7] from making compensation for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; [8] from in any manner sharing in the legal fees of any lawyer, or countenancing the splitting of such fees with any layman or lay agency; [9] and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers; [10] and, in general, from violating the laws govern-

[5] See the testimony of petitioner's president during pretrial proceedings in the Virginia case that "[i]f we thought for a moment" that a consent decree along the lines of the Illinois opinion would be acceptable "we would make it effective tomorrow." App. 91, *Brotherhood of R. R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

> ing the practice of law in the Commonwealth of Virginia." *Brotherhood of Railroad Trainmen* v. *Commonwealth ex rel. Virginia State Bar*, 207 Va. 182, 184 n. 1, 149 S. E. 2d 265, 266 n. 1 (1966) (numbers have been inserted for convenient reference).

The Brotherhood sought and obtained review by this Court, limiting its attack to the provisions numbered (2), (4), and (9) above. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 4–5 (1964). This was apparently the result of a tactical decision, for it enabled the Brotherhood to argue that it had acquiesced in the restraints imposed on its activities by the Illinois Supreme Court, which that court had held were adequate to protect the ethics of the legal profession and the public interest.[6] The Brotherhood therefore could take the position that it contested the Virginia decree only because "the [Virginia] Bar sought a more restrictive injunction than the Illinois opinion suggested." Reply Brief, at 29, *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

This Court accepted the Brotherhood's contentions and reversed. On remand, the Virginia courts deleted the

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[6] The Court acknowledged this limitation on the Brotherhood's contentions:

"Certain other provisions of the decree enjoin the Brotherhood from sharing counsel fees with lawyers whom it recommended and from countenancing the sharing of fees by its regional investigators. The Brotherhood denies that it has engaged in such practices since 1959, in compliance with a decree of the Supreme Court of Illinois. See *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163. Since the Brotherhood is not objecting to the other provisions of the decree except insofar as they might later be construed as barring the Brotherhood from helping injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood, it is only to that extent that we pass upon the validity of the other provisions." 377 U. S., at 5, n. 9.

provisions struck down by this Court, replaced provision (10) with a prohibition on "sharing in any recovery for personal injury or death by gift, assignment or otherwise," altered the wording of the remaining provisions in minor respects, and upheld the modified decree as consistent with this Court's mandate. 207 Va. 182, 149 S. E. 2d 265 (1966). The Brotherhood did not seek review of this decision, and it became final in due course.

II

Given this background, with which counsel below and the trial judge were generally familiar, the proceedings now under review appear in a substantially different posture. The State Bar's complaint charged unlawful solicitation of business. The Brotherhood's answer, after admitting the charges in some respects and denying them in others, set up the Illinois Supreme Court opinion as an affirmative defense, noting that the Michigan State Bar had been aware of that proceeding and had assisted in it, although it was not formally a party. The answer observed that the Illinois court had declared certain features of the Brotherhood's activities lawful and other features unlawful and directed the discontinuance of the latter. The answer then averred that after the filing of the Michigan complaint the Brotherhood had brought itself into compliance with the Illinois opinion. The answer quoted the above-mentioned letter from the Brotherhood's president as proof. On this basis, the Brotherhood contended that the conduct complained of either was permissible or had terminated, so that the bill should be dismissed for want of equity and for mootness. App. 15–17.

In its reply the State Bar specifically relied on the Brotherhood's admissions in the Illinois proceedings and the findings of the Illinois court as working an estoppel of the defendants with respect to at least some of the matters

there in issue. App. 20–24.[7] However, the reply leaves unclear just what the Bar considered to be involved in the Michigan lawsuit. It described the Michigan Bar's cause of action as both broader and narrower than the Illinois lawsuit. App. 23–24. The next pleading filed, a "Statement of Claim," did little to clarify matters. It referred only to the Brotherhood's scheme of solicitation of legal business, but included allegations that as part of the scheme regional counsel made payments to the Brotherhood and to regional investigators and also contributed to the financial support of clients during the pendency of litigation. App. 29.

The trial judge apparently sought to clear up the confusion as to just what was in issue by including in the pretrial summary a provision that "[i]n the event there is not a consent decree, defendants have been requested to advise what issue in Michigan is different than in the other states where consent decrees have entered." App. 30. There is nothing in the record to indicate that the defendants responded to this request in a way designed to limit the issues to solicitation.

After the initial hearing on this case the trial judge entered a decree that *inter alia* prohibited the Brotherhood from "[e]ngaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in In re Brotherhood of Railroad Trainmen." App. 117. In this connection he observed that "although certain activities and conduct as contained in the Illinois decision were not specifically pleaded in the instant suit, nevertheless, by the defendants' answer, they have been indirectly injected into this litigation and should be covered by the Court's order." App. 112. Inasmuch as the activi-

[7] The reply also referred in passing to actions in courts of other States where the Brotherhood has been condemned for engaging in "the same or similar practices as those at issue in this cause." App. 25.

ties referred to, see pp. 2–4, *supra,* were directly related to the solicitation charged in the State Bar's complaint, I consider this decision by the judge to be entirely justifiable.

While it is unfortunate that the record is as stale as it is, there is ample evidence to indicate that the Brotherhood's conduct at least as of the time the bill of complaint was filed was of such a character as to call for the decree before us. The Brotherhood, despite its repeated allegations that the objectionable features of this conduct ceased in April 1959, failed to introduce any proof to that effect during the evidentiary hearing in 1961. In the 1965 and 1968 proceedings on remand from the Michigan Supreme Court, the Brotherhood did not request a reopening of the record, or even assert that there had been any significant change in factual circumstances since the original proceedings. Moreover, Michigan law provides for modification of a continuing injunction upon a proper showing of changed circumstances. See *First Protestant Reformed Church* v. *DeWolf,* 358 Mich. 489, 495, 100 N. W. 2d 254, 257 (1960) (dictum), citing *United States* v. *Swift & Co.,* 286 U. S. 106, 114 (1932). With matters in this posture, I am content to pass on the validity of the decree despite the state of the record.

III

I agree that in light of this Court's recent decisions, one portion of the Michigan decree—that prohibiting the union from controlling the fees charged by attorneys—cannot stand. In *United Mine Workers* v. *Illinois Bar Association,* 389 U. S. 217 (1967), the Court held that as a matter of federal constitutional law a labor union is entitled to engage an attorney to represent its members in matters of collective interest, free of direct financial charge to them. While I believed then and still believe that this was an unsound piece of constitutional adjudi-

cation, I am unable to distinguish the facts of *Mine Workers* from those in the case at bar, where a union agreed with attorneys as to the maximum fee to be charged its members in matters of collective interest. Despite the Brotherhood's prior acquiescence in the decrees in Virginia and other States, I find the unforeseeable change in the law wrought by the *Mine Workers* decision sufficient to justify relieving it from the consequences of taking that position. See Restatement of Judgments § 70 (1942); 1B J. Moore, Federal Practice ¶ 0.448 (1965). I therefore concur in the Court's vacating this portion of the Michigan decree. In all other respects I think the decree is consistent with our past decisions and otherwise valid.

The first portion of that decree prohibits the Brotherhood from "giving or furnishing legal advice to its members or their families." I do not understand that the Court's "common sense" approach to the First Amendment extends to the point that laymen are constitutionally entitled to give legal advice to other laymen. I think it plain that the provision was intended to prohibit *only* such conduct. It is manifestly based on the Virginia decree, where the corresponding provision was supported by the chancellor's finding that "[i]n furtherance of the plan the defendant Brotherhood has advised, and continues to advise, its members and the families of deceased members with respect to the legal aspects of their claims." 207 Va., at 183 n. 1, 149 S. E. 2d, at 266 n. 1. The provision is also related to the prohibition in the 1962 Michigan decree against "[t]elling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan." App. 117. I therefore can only consider fanciful the Court's suggestion that the "plain meaning" of this prohibition "would

emphatically deny the right of the Union to employ counsel to represent its members." *Ante*, p. 4. In any event, if there is any ambiguity in the decree the appropriate course is to clarify it, not to strike it down.

The second provision of the decree, prohibiting the Brotherhood from furnishing attorneys with information about accidents and the names and addresses of injured workers, orders it to refrain from conduct that it averred but did not prove had been terminated. Nothing in our prior decisions approves the solicitation of business by lawyers except insofar as the solicitation may be correlative to the rights of the clients. See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S., at 8. There is no reason in terms of First Amendment interests why the Brotherhood should not be obliged to give the results of its investigations to the injured person to take to whatever lawyer he chooses rather than for the Brotherhood to give it to the lawyer it prefers. The provision is plainly appropriate as a means of ensuring that the injured workman has a truly free choice. In effect this provision of the decree is designed to fend against "ambulance chasing," an activity that I can hardly suppose the Court thinks is protected by the First Amendment.

Another provision of the decree prohibits the Brotherhood and its members from "stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." I think it a close question whether the conduct thus proscribed is protected under this Court's opinion in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964). As petitioner admits, while it is not generally improper for an attorney to make advances to clients, it is considered improper for

him to use the fact that he makes them as a drawing card in an effort to secure professional employment. At the same time, there is no contention made that the representation thus proscribed is inaccurate, and misapprehension on this score may well be the determinative factor in an injured man's decision not to seek legal advice in connection with his claim. On balance, I conclude that the equities do not call for relieving petitioner of its considered decision to acquiesce in this portion of the Virginia decree and the corresponding portions of consent decrees entered in other States.

The remaining provisions of the decree prohibit the Brotherhood from sharing in legal fees or recoveries, and prohibit the members from accepting compensation for solicitation of business for a lawyer. These provisions are entirely appropriate to remove any temptation for the representatives of the Brotherhood to overbear the injured man's choice of legal representation. They prohibit conduct which has long been considered unethical, and which in no significant way advances the interests that the Court's prior decisions in this field sought to protect. I see no basis whatever for striking down these provisions of the decree.[8]

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[8] The Brotherhood explicitly admitted in its answer that its members had in the past received compensation from regional counsel for services in furnishing clients, App. 17, and the opinion of the Illinois Supreme Court, on which the Brotherhood relied, detailed the manner in which regional counsel were required to support the Brotherhood's Legal Aid Department. See p. 2, *supra*. This scheme was the end product of an evolution from more direct forms of fee-splitting, a process described in *Hulse* v. *Brotherhood of Railroad Trainmen*, 340 S. W. 2d 404, 408–409 (Mo. 1960). The court below, having found the evil in a matured form, was entitled to proscribe as well the straightforward manifestation in which it had begun. Moreover, it is well settled that a court of equity, like an administrative agency, "cannot be required to confine its road

For these reasons I would sustain the judgment of the Michigan Supreme Court, with the exception already noted for the prohibition on controlling the fees charged by any lawyer. However, it is appropriate for me to make a few general remarks in closing. I share my Brothers' concern with the problems of providing meaningful access to competent legal advice for persons in the middle and lower economic strata of our society. This is a matter of public concern deserving our best efforts at resolution, a task that the organized bar may be thought to have been too slow in recognizing. Nor do I condone, any more than my Brethren, the nefarious practices that called forth the Brotherhood's plan before us today.

But the issue presented for decision is not the desirability of group legal services, or the ways in which the traditional concepts of professional ethics should be modified to take account of the changes in social structure and social needs since the 19th century. The issue rather is the scope left by the Federal Constitution for state action in the regulation of the practice of law. Despite the First Amendment implications of denial of access to the courts in other situations, see *NAACP* v. *Button*, 371 U. S. 415, 452–455 (1963) (dissenting opinion), all that is involved here is a combination of purchasers of services seeking to increase their market power. The relationship to First Amendment interests seems to me remote at best. Cf. *Associated Press* v. *United States*,

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block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952) (footnote omitted). See, *e. g.*, *Local 167* v. *United States*, 291 U. S. 293 (1934); *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

326 U. S. 1, 19–20 (1945). Recognizing that a majority of my Brethren felt otherwise in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), and *United Mine Workers* v. *Illinois Bar Association*, 389 U. S. 217 (1967), I accept their conclusion. I would not, however, extend those cases further than is required by their logic. Accordingly, with the one exception noted, I would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 434.—October Term, 1970

United Transportation Union, Petitioner, *v.* The State Bar of Michigan. } On Writ of Certiorari to the Supreme Court of Michigan.

[April 5, 1971]

Mr. Justice White, with whom Mr. Justice Blackmun joins, concurring in part and dissenting in part.

The first provision in the decree prohibiting the union from giving or furnishing legal advice to its members or their families is overbroad in light of *United Mine Workers* v. *Illinois Bar Association*, 389 U. S. 217 (1967), and should be narrowed to prohibit only legal advice by nonlawyers. Also, I agree with the Court that the portion of the decree forbidding the setting of fees by union-lawyer agreement cannot stand. Otherwise, however, I do not read the decree as being inconsistent with our prior cases and I would not now extend them to set aside this decree in its entirety.